Office-Supreme Court, U.S.
FILED
JUL 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2217

Supreme Court of the United States

OCTOBER TERM, 1980

SELIGMAN & ASSOCIATES, INC.,
Petitioner,

-v-

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

IRWIN M. ALTERMAN
HYMAN, GURWIN, NACHMAN,
FRIEDMAN & WINKELMAN
17117 West Nine Mile Road
16th Floor
Southfield, Michigan 48075
(313) 559-7500

Counsel for Petitioner

QUESTIONS PRESENTED

1. Did the Court of Appeals lack jurisdiction under Section 10(f) of the National Labor Relations Act, 29 USC 160(f), to review the merits of the Board's unit determination when that determination was unnecessary to the Board's decision, was the subject of a pending review in another proceeding, and neither party in this case was an aggrieved party under Section 10(f) since they agreed that the unit determination should be decided in the other proceeding?

2. If the Court of Appeals had jurisdiction to review the unit determination, did it have the discretion to abstain from deciding that issue when it was the subject of a pending review in another proceeding and both parties stipulated that the unit determination should be decided in the other proceeding?

3. Was the Court of Appeals wrong in approving the unit determination where the sole evidence relied on by the General Counsel was the transcript, exhibits, and decision from another proceeding and the Administrative Law Judge (ALJ) ruled that she was required to admit such evidence regardless of its hearsay nature and regardless of the availability of the same witnesses to appear and testify?

4. Was the Court of Appeals wrong in finding that certain claims of unfair labor practices were not barred by the statute of limitations, express waiver, or estoppel?

5. Did the Court of Appeals incorrectly apply the standard of review set out in **Universal Camera Corp v NLRB**, 340 US 474 (1951), when it held that the Board's findings of an employer-employee relationship, an appropriate unit, and the commission of unfair labor practices were supported by substantial evidence?

6. When the Court of Appeals ordered enforcement of notice posting at all 21 of the apartment complexes managed by petitioner rather than at the few complexes where unfair labor prac-

tices were found, did it incorrectly apply the standard of review by implicitly approving the Board's underlying factual justification for finding that remedy appropriate?

7. Was the Court of Appeals wrong in finding only partial compliance with the Board's reinstatement order when in fact the Board expressly deferred consideration of this question and made no factual finding about compliance?

8. Is an order requiring offers of reinstatement to certain employees, and a notice including that language, beyond the authority of the Board and Court of Appeals, as moot or otherwise, or an abuse of discretion, when unconditional offers of reinstatement were served on the employees and in evidence at the hearing?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, not yet reported, appears in the appendix.

The decision and order of the National Labor Relations Board, 240 NLRB No. 10 (1979), and the decision and order of the Administrative Law Judge, affirmed and adopted by the Board, also appear in the appendix.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Sixth Circuit were dated and entered on January 21, 1981. The Court denied petitioner's request for a rehearing on April 30, 1981. This petition for certiorari was filed within the 90 day period prescribed by 28 USC 2101(c) and Supreme Court Rule 20. This Court's jurisdiction is invoked under 28 USC 1254(1).

STATUTES AND RULES INVOLVED

Jurisdiction For Review Of Board
Order And Standard Of Review

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals . . . . [T]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall . . . be conclusive. Section 10(f), National Labor Relations Act ("NLRA"); 29 USC 160(f).

Provisions Regarding Unfair
Labor Practice Proceedings

> Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of

civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28. Section 10(b) NLRA, 29 USC 160(b).

Every party has a right . . . to conduct such cross-examination as may be required for a full and true disclosure of the facts . . . . 29 CFR 101.10(b)(2).

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. FRE 201(b).

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. FRE 801(c).

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress. FRE 802.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: Testimony given as a witness at another hearing of the same or a different proceeding . . . . FRE 804(b)(1).

Provisions Regarding
Representation Proceedings

The hearing . . . is held before a hearing officer who normally is an attorney or field examiner attached to the regional office but may be another qualified official. The hearing . . . is nonadversary in character . . . . 29 CFR 101.20(c).

The rules of evidence prevailing in courts of law or equity shall not be controlling. 29 CFR 102.66(a).

Statute Of Limitations
For Filing Of Charges

[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . . §10(b) NLRA, 29 USC 160(b).

Complaints, orders, and other process and papers of the Board . . . may be served either personally or by registered or certified mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. Section 11(4) NLRA, 29 USC 161(4).

Charges . . . may be served personally or by registered or certified mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. 29 CFR 102.111(a).

STATEMENT OF THE CASE

Petitioner Seligman & Associates, Inc. ("Seligman"), through its unincorporated division Scott Management Company, has management contracts to manage 21 separate apartment complexes in Southeastern Michigan. The claims in this unfair labor practice case arose out of a union organizing effort at some of the apartment complexes managed by Seligman.

Of the complexes which Seligman contracts to manage, 19 are owned by separate partnerships. Two are owned by Seligman. The complexes have a separate practical identity, with separate names, separate advertisements under their own names, and separate business addresses. They are geographically far apart, with distances as great as 85 miles. They were built at different times, are different sizes ranging from over 300 units to under

100 units, and serve different income classes of tenants.

All but 4 of the complexes are HUD-financed. These complexes are subject to HUD regulations which require that all on-site personnel be employees of the complex owner and not the management company.

The employees' salaries and all other project expenses are paid out of the income of each complex. Seligman does not share in the profit or loss of any complex. For convenience, checks are issued in the name of Scott Management Company, but the accounts are kept strictly separate.

Labor matters are largely controlled by the resident managers at each complex.

The complaint issued by the Board alleged unfair labor practices occurring between December 1976 and May 1977 at only a few of the 21 complexes managed by Seligman. Seligman argued that the suggested 21-complex unit was not appropriate and that it was not the employer of the people working at the individual complexes not owned by Seligman.

During the same time that the Board considered the unfair labor practice charges and issued its complaint and various amendments to the complaint, the Board was also considering a petition for an election filed by the union on December 8, 1976 (the representation case). The representation case petition also claimed that certain employees in the 21 separate apartment complexes together constituted an appropriate unit. After a lengthy hearing in that case, the Regional Director filed a decision which sustained the requested unit. Seligman filed a request for review of the Regional Director's decision.

After the Regional Director's decision in the representation case, the Board amended its unfair labor practice complaint to request a bargaining order. Because of this request for a bargaining order, proceedings in the representation case were suspended pending decision in the unfair labor practice case.

Since a bargaining order was requested in the unfair labor practice case, the General Counsel introduced evidence on the question of an appropriate unit. Over Seligman's objection, he introduced the transcript, exhibits, and decision from the representation case as its sole evidence on the question of an appropriate unit. Most of the witnesses whose transcripts were admitted actually testified at the unfair labor practice hearing, but not on the question of an appropriate unit. The other witnesses whose transcripts were admitted were available to testify at the unfair labor practice hearing. The ALJ ruled nonetheless that she was required to admit this record from the representation case regardless of its hearsay nature and regardless of the availability of the same witnesses to appear and testify in the unfair labor practice case.

With regard to the unfair labor practice charge by David and Susan Younce, Seligman argued that it was barred by the statute of limitations, express waiver, or estoppel. The Younces were terminated on October 7, 1976. Shortly after, Susan Younce filed an unfair labor practice charge. Seligman quickly offered reinstatement to the Younces when the Board informed it of the charge. In the meantime, Susan Younce decided to drop the charge because she was afraid the government might learn she was collecting welfare benefits while working. The Board agent opposed her dismissing the charge.

Susan Younce then contacted an officer of Scott Management to advise them that she wanted to drop the charge. She met with an attorney for Scott and executed a lengthy affidavit reciting the factual background. He assisted her, at her request, in preparing a formal letter to the Board seeking to withdraw the charge because she and her husband had other jobs they would rather have and they did not want back pay. Eventually the Board permitted her to drop the charge.

On April 7, 1977 the Younces filed a second charge. This was the last day for filing and serving the charge under the six-month statute of limitations. The only service made on that day was on the resident manager at Eureka Townhouses, the com-

plex at which the Younces had been employed. The charge was not served at the Scott Management office in Southfield, Michigan, which was listed as the address of the respondent in the charge itself.

Seligman argued that, under these circumstances, the charge was not properly filed and served within the limitations period. Alternatively, Seligman argued that Younce's lengthy affidavit and letter to the Board withdrawing the first charge expressly waived her rights and that the Younces were estopped from seeking reinstatement and back pay because they rejected a reinstatement offer one month after their termination.

In one of the early sessions of the unfair labor practice hearing, Seligman distributed written reinstatement offers directly or through the union representative to all individuals except one covered by the reinstatement order as enforced by the Court of Appeals. These offers were made part of the record at the hearing.

The ALJ's decision held that the requested 21-complex bargaining unit was appropriate and that Seligman was the employer of the employees at each complex. The decision, however, denied the request for a bargaining order because the proofs did not show majority support for the union in the requested bargaining unit. The decision also found some of the unfair labor practice allegations supported by the evidence, including the termination of the Younces. It rejected the statute of limitations, waiver, and estoppel defenses. The ALJ recommended a cease and desist order, reinstatement with back pay of the employees found improperly discharged, and posting of a notice regarding the decision at all 21 complexes.

On appeal the Board adopted the ALJ's decision and order. Seligman filed a petition for review in the Court of Appeals for the Sixth Circuit and the Board filed a cross-petition for enforcement of the order. Jurisdiction in the Court of Appeals was pursuant to Section 10(e) and (f), 29 USC 160(e) and (f). The Court of Appeals affirmed the Board's decision in all

respects.

Despite the fact that neither party sought review of the merits of the unit determination, the Court of Appeals addressed that question and affirmed the Board's finding. Seligman argued that the unit determination was gratuitous dictum, since no bargaining order was issued. Seligman argues that it was therefore improper for the ALJ to decide this question and that the court should rule that the unit determination in this case was not binding in the representation case where review of the same question was still pending. The Board did not even brief the merits of the question and, in a footnote reference, suggested that the court had no jurisdiction to review the unit determination because Seligman was not an "aggrieved party" under Section 10(f) with respect to this question, since no bargaining order had been issued.

At oral argument before the Court of Appeals, one panel member inquired about the issue and stated that the unit determination was not binding in the representation case. Seligman's counsel then stated he would not pursue those issues and requested the panel to indicate in its opinion that the unit findings were not binding in the representation case. Counsel for the Board concurred in the legal conclusion at oral argument.

Despite the agreement of the parties and the apparent position of one panel member, the Court of Appeals opinion stated that the Court was required to review the unit determination and affirmed it on the merits. Seligman's motion for rehearing on this question was denied.

REASONS FOR GRANTING THE WRIT

The decisions below that the court was obliged to review the merits of the unit determination and that the incorporation of the record from the representation case in the unfair labor practice case was proper decided important questions of federal law which have not been, but should be, settled by this Court.

The Court of Appeals decision exhibits numerous errors which call for the exercise of this court's power of supervision.

Decision On The Merits
Of The Unit Determination

Despite the parties' agreement that the merits of the unit determination should not be considered in this case but rather should be reviewed in the normal course of the repesentation case, the Court of Appeals decided the question. It appears that the court thought it was required to decide this question. It stated:

> The Administrative Law Judge addressed the question, however, and our function is to decide whether his [sic] unit determination is supported by substantial evidence. . . . That the decision on the request for a bargaining order did not require a unit determination is of no concern to this Court.

Slip Opinion, p 3; A 3.

It was Seligman's position before the ALJ and in the Court of Appeals that, since no bargaining order was issued, the unit determination was unnecessary.

Unnecessarily reaching the merits of this issue is highly prejudicial to Seligman. Seligman has a presently pending request for direct review of the decision in the representation case. A decision here, based almost solely on the incorporated record from the representation case, is effectively a collateral review of the decision in the representation case. It would preempt Seligman's right of direct review in the representation case. There is no provision in the law or applicable regulations for such short-circuiting of the process in a representation case.

A decision on the merits of the unit determination was wrong for two reasons. First, the Court of Appeals ignored an important question of subject matter jurisdiction. Since no bargaining

order was entered, that portion of the Board's complaint did not result in a remedial order against Seligman. Since there was no remedial order against it, Seligman was not an "aggrieved party" under Section 10(f) and was not entitled to seek review of the unit determination. **UAW v Scofield**, 382 US 205, 210 (1965). Since the Board did not seek review of this question and agreed in its brief that Seligman was not an "aggrieved party", the court had no subject matter jurisdiction under either Section 10(e) or 10(f). Both parties concurred in this analysis, but the court did not even address the question of subject matter jurisdiction.

Second, even if the court had subject matter jurisdiction, it was wrong in holding that it was bound to review the merits of the unit determination because the ALJ addressed the question, regardless of whether the determination was necessary to the ALJ's decision, regardless of the pending representation case, and regardless of the parties' stipulation that the matter be decided in the representation case. There is no such requirement in law. A court of appeals has broad equitable jurisdiction to review the Board's decision and "enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." Section 10(e) and (f), 29 USC 160(e) and (f). Under this broad power, the court could vacate the Board's unit determination or declare that the determination in this case would not be binding in the representation case. Contrary to its past authority recognizing that the court has equitable discretion in deciding whether to enforce a Board order, **NLRB v Brown Lumber Co**, 336 F2d 641, 645 (CA 6 1964), the court did not recognize its discretion in this matter. **Cf. UAW v Scofield**, 382 US 205, 211-212 (1965). And in light of the parties' stipulation to contest the unit determination in the representation case, it would be an abuse of discretion to decide the question in this case.

The Court of Appeals' cursory discussion of this question constitutes an implicit decision on an important question of federal labor law which has not been addressed by this Court.

Admission Of Record
From Representation Case

With regard to the admission of the transcript, exhibits, and decision from the representation case in this case, the Court of Appeals did not even discuss the important questions raised by Seligman. It simply said that "[t]he Board need not permit complete relitigation of the unit determination issue." Slip Opinion, p 3; A 3. It cited a single case that held that the record from a representation proceeding "could" be incorporated into the record in an unfair labor practice case and "may be accorded 'persuasive relevance' ". **Amalgamated Clothing Workers** v **NLRB**, 365 F2d 898, 905 (CA DC 1966). This, however, misses the point. The ALJ did not hold that she was exercising her discretion to admit the record of the representation case and did not cite any reasons of convenience or probative value. Rather she held that she was **required** to admit the proffered record regardless of its hearsay nature and regardless of the fact that virtually all of the witnesses who testified in the representation case were available to testify in this case. In affirming this decision the Court of Appeals again blurred the distinction between required and discretionary acts.

The admission of the representation case record was prejudicial and unwarranted for several reasons. First, the transcript is inadmissible hearsay. Unfair labor practice proceedings are governed by the Federal Rules of Evidence so far as practicable. Section 10(b), 29 USC 160(b). The transcript is clearly hearsay since it was offered as a substitute for the testimony of the witnesses. In other words, the statements were offered to prove the truth of the matter asserted in them. This is inadmissible hearsay. FRE 801(c), 802. The only time that prior testimony is admissible is when the declarant is unavailable as a witness. FRE 804(b)(1). That was not the case here.

The admission of the transcript resulted in the ALJ's inability to assess the credibility of the witnesses by judging their demeanor. The transcript itself contains much that would be inadmissible hearsay. In fact, much of it contains argument concern-

ing such inadmissible hearsay.

Another reason why admission of the representation case record was prejudicial is that counsel had no opportunity to object to testimony or contemporaneously cross-examine witnesses under the stricter standards that apply in unfair labor practice cases. An unfair labor practice case is an adversary proceeding before an administrative law judge governed by the same rules of procedure and evidence that apply in United States district courts. Section 10(b), 29 USC 160(b). Each party has the right to "conduct such cross-examination as may be required for a full and true disclosure of the facts." 29 CFR 101.10(b)(2).

A representation proceeding is far different. It is "nonadversary in character". 29 CFR 101.20(c); **NLRB** v **Fresh'nd-Aire Co**, 226 F2d 737, 740-741 (CA 7 1955). The hearing officer in a representation case is not a qualified administrative law judge and need not even be an attorney. 29 CFR 101.20(c). Board regulations explicitly provide that the rules of evidence do not control. 29 CFR 102.66(a). The hearing officer in this representation case repeatedly stymied Seligman's efforts to cross-examine witnesses, stating that if Seligman had better information, then it should present its best evidence. Perhaps the most significant difference between the representation case and this unfair labor practice case is the hearing officer's ruling that credibility of a witness was not an issue in the representation case and could not be explored on cross-examination.

The General Counsel attempted to justify his introduction of the representation case record by arguing that the Board could take judicial or administrative notice of its proceedings. Judicial notice was not applicable here. First, it is not uniformly agreed that courts may take judicial notice of other proceedings. **NLRB** v **Daniels**, 202 F2d 579, 586 (CA 6 1953). Even the authorities that permit judicial notice of other proceedings distinguish between noticing the existence of the proceedings, which may be proper, and using the contents to prove the truth of the matters asserted there, which is entirely different. **Trans World Airlines, Inc** v **Hughes**, 308 F Supp 679, 684 (SD NY

1969), rev'd on other grounds, 449 F2d 51, 67 (CA 2 1971. Most importantly, the rules of evidence limit judicial notice to facts "not subject to reasonable dispute". FRE 201(b). The facts asserted in the representation case testimony were obviously disputed.

Finally, the Regional Director's decision in the representation case was inadmissible for several reasons. First, it was not even a final decision. The request for review was and still is pending. Second, the decision was based on a record that contained substantial hearsay testimony that would not be admissible in an unfair labor practice proceeding. Third, the decision is itself hearsay. Fourth, since the ALJ recognized that she was not bound by the decision, it has no evidentiary value at all. It is simply another person's opinion on a question on which the ALJ recognized she would make an independent decision.

The Court of Appeals' error in its four-sentence discussion of admission of the representation case record is that it does not even acknowledge the arguments above or apply the proper law under the rules of evidence. Its blithe approval of the admission of a record created in one proceeding under entirely different standards implicitly abridges the statutory standards governing unfair labor practice proceedings. This involves an important question of federal labor law having wide application to the many unfair labor practice proceedings that are conducted by the Board. It is a question not addressed by any decision of this court and one on which a clear statement of standards is needed to give guidance to the lower courts and to the Board.

Affirmative Defenses
Against Younce Charge

The charge was filed on April 7, 1977, the last day before the expiration of the six-month limitations period in Section 10(b), 29 USC 160(b). The only service was made on the resident manager at the complex where the Younces formerly worked. The statute and Board regulations require service personally, by registered or certified mail, by telegram, or by leaving a copy at

the principal office of the person to be served. Section 11(4), 29 USC 161(4); 29 CFR 102.111(a).

The ALJ's decision found that Seligman's principal place of business is 24315 Northwestern Highway, Southfield, Michigan, and this was designated as the employer's address on the charge itself. Service at another location does not meet the statutory requirement.

The Court of Appeals relied on **NLRB** v **Clark**, 468 F2d 459(CA 5 1972), to support its conclusion that service was effected during the limitations period. **Clark**, however, stated that, if an employer is engaged in several enterprises, it would be exceedingly technical and precarious to require the server to determine the "most important" or "principal" office. Here there was nothing precarious or obscure in determining the principal place of business. Seligman had only one office address and one office. It had no office at the complex where the Younces had worked. Thus the Court of Appeals' ruling is wrong as a matter of law.

The Court of Appeals also found there was no waiver of the Younces' charge. This was in spite of the three-page affidavit signed by Susan Younce, her letter to the Board stating that she had come to "a happy agreement" with Seligman, and her testimony to the same effect.

The Board failed to consider any of these facts of express waiver. Its decision missed the point when it merely said that the withdrawal of a charge does not waive the claims. Seligman's waiver argument is not merely based on the withdrawal of a prior charge but rather on the express waiver in writing and orally on numerous occasions. The Court of Appeals' finding of no waiver is simply contrary to all of the evidence in the record.

The order for reinstatement or back pay for the Younces is in any event barred by estoppel. The Younces admitted they were offered reinstatement with back pay and rejected this offer one month after termination on the ground that they wanted to drop

their charges, had other jobs, and did not want reinstatement or back pay. Seligman promptly took corrective action on the initial charge and communicated its reinstatement offer directly to the Board agent who in turn communicated it to the Younces. Seligman reasonably relied on the Younces' rejection. The order now for reinstatement or back pay would severely damage and prejudice Seligman. It discourages voluntary efforts to correct the effect of possible unfair labor practices. This matter was not discussed at all by the ALJ or Board decisions and was dismissed by the Court of Appeals in one sentence.

The summary rejection of these substantial defenses to the Younce charges is such a departure from proper judicial review as to call for an exercise of this court's power of supervisions.

Numerous Findings Are Unsupported By Substantial Evidence

The standard of review for a court of appeals in a labor case is clear. The court must set aside findings not supported by "substantial evidence on the record considered as a whole". Section 10(f), 29 USC 160(f). In judging whether a factual finding is supported by substantial evidence, the court must review the entire record and "take into account whatever in the record fairly detracts from" the Board's conclusion. **Universal Camera Corp v NLRB**, 340 US 474, 488 (1951). An examination of the record, however, reveals the Court of Appeals approved findings that are contrary to the great weight of the evidence.

Unit Determination

This error is particularly evident in the unit determination. The ALJ decision itself explicitly acknowledged that the 21 complexes found to be an appropriate unit are owned by separate legal entities. A 43. The decision acknowledged that the complexes are located all over the Detroit area, some as far as 60 miles apart, that they are of various sizes and serve tenants of varying economic status, that some are HUD regulated and some are not, that Seligman keeps separate accounts for each

complex, and that the on-site managers hire and fire employees and determine their specific wages. A 43.

The Board's decision, and the Court of Appeals' affirmance, relied on the "centralized control" of Seligman over employees in the complexes it manages. A 43; Slip Opinion, p 3, A 3. This "centralized control" is, however, comprised mainly of centrally provided services, such as data processing and purchasing, which are the function of an apartment management company. The crucial matters of labor relations, which alone are appropriate to the unit determination, were explicitly recognized as local matters by the ALJ decision. A 12. It noted that most complexes have their own manager who supervises all aspects of the employees' work at the complex, hires, fires, determines salary, assigns work, adjusts grievances, and disciplines employees. A 12. In view of this acknowledgment on the face of the ALJ decision, the 21-complex unit determination is clearly not supported by substantial evidence. Moreover, there is no Board precedent finding an overall unit for an apartment management company such as Seligman.

Employer-Employee Relationship

A closely related question to the unit determination is whether an employer-employee relationship exists between Seligman and the employees at each complex. It was uncontroverted that each complex is owned by a separate partnership except for two owned directly by Seligman. In the 17 HUD-financed projects, HUD regulations require that on-site personnel be employees of the project owner, not the management company. A 13. Employee wages are paid out of project income, not Seligman's management fee. A 10. As stated above, the ALJ decision explicitly acknowledged that labor matters are controlled by the local resident managers, not by central office employees of Seligman. A 12. Once again, from the face of the ALJ decision, it appears that the crucial facts are contrary to the ultimate decision and the finding of an employer-employee relationship is unsupported by substantial evidence.

Notice Posting

The requirement of notice posting at all 21 complexes is similarly unsupported. To the extent that it depends on the unit determination and the finding of an employer-employee relationship, the arguments above apply. The ALJ's one-sentence explanation of why notice would be required at all 21 complexes mentioned "the nature and extent of the unfair labor practices found" and the fact that they were committed by Seligman's central office project managers and president. A 42. The record, and in fact the ALJ decision, do not support this characterization of the evidence. Almost all of the unfair labor practices found in the decision occurred at two complexes. If a hostile attitude and direction of the unfair labor practices by central personnel were the fact, there would have been charges at even more complexes and the dismissed charges at several complexes would have been sustained. The statement that the unfair labor practices may have been committed by Scott Management Company's president is simply not true. The president was not charged with, nor found guilty of, any unfair labor practice. In sum, the problems were isolated and largely limited to one resident manager who was terminated one month after Seligman first learned of the allegations against him.

The record is silent as to any effect on employees at other complexes. The only witnesses were from the involved complexes and they had hardly any contact with other employees. In light of this, there is no evidence, let alone substantial evidence, to support the finding of pervasive unfair labor practices in all 21 projects which would justify notice posting at all projects.

Other Unfair Labor Practices

Three of the unfair labor practice charges sustained by the Court of Appeals are also similarly unsupported. Space limitations prevent an examination of the evidence in each of those charges, but, in view of the Court of Appeals' failure to properly apply the **Universal Camera** standard in the important matters discussed above, the evidence supporting these charges

should be reviewed as well.

Reinstatement Order

Seligman offered unconditional reinstatement to the involved employees except for one during the unfair labor practice hearing. The ALJ expressly declined to decide whether these were sufficient offers of reinstatement yet recommended an order requiring reinstatement and posting a notice of the reinstatement. A 43. The Court of Appeals stated there was only "partial compliance" with the reinstatement order. Slip Opinion, p 4; A 4. The error here is two-fold.

First, the Board cannot order Seligman to do what it has already done. Reinstatment is moot. Nor can the notice imply that Seligman has not already offered reinstatement, because this is simply untrue.

Second, the Court of Appeals, in finding "partial compliance", appears to review a factual finding not made by the Board below. The ALJ expressly declined to decide whether there was compliance. The Court of Appeals does not confront the inconsistency between the Board's abstention from deciding whether the reinstatement offers were adequate and an order requiring reinstatement.

CONCLUSION

For the reasons stated above, the petitioner prays that the court grant its petition for a writ of certiorari, reverse the judgment of the Court of Appeals, and deny enforcement of the Board's order.

Respectfully submitted,
HYMAN, GURWIN, NACHMAN,
FRIEDMAN & WINKELMAN

By: _____
Irwin M. Alterman
Attorneys for Petitioner

June , 1981

Office-Supreme Court, U.S.
FILED
JUL 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2217

Supreme Court of the United States

OCTOBER TERM, 1980

SELIGMAN & ASSOCIATES, INC.,
Petitioner,

-v-

NATIONAL LABOR RELATIONS BOARD,
Respondent.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IRWIN M. ALTERMAN
HYMAN, GURWIN, NACHMAN,
FRIEDMAN & WINKELMAN
17117 West Nine Mile Road
16th Floor
Southfield, Michigan 48075
(313) 559-7500

Counsel for Petitioner

No. 79-1115

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SELIGMAN AND ASSOCIATES, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

ON PETITION for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Decided and Filed January 21, 1981.

Before: WEICK and MARTIN, Circuit Judges; and NIXON, District Judge.*

MARTIN, Circuit Judge. This case is before the Court on the petition of Seligman and Associates, Inc. for review of an order of the National Labor Relations Board and on the Board's cross-application for enforcement of the order. The unfair labor practices at issue here arose out of organizing activities by Local 79, Service Employees International Union, AFL-CIO and by various employees at the apartment complexes managed by Scott Management Company, an unicorporated division of Seligman. On December 8, 1976, the union filed a petition for an election in a unit of all maintenance men, custodians, care-

*Honorable John T. Nixon, United States District Judge for the Middle District of Tennessee, sitting by designation.

takers, and groundsmen employed at the 21 apartment projects managed by Scott. In a separate proceeding, Scott contended that this was not an appropriate unit and also that assistant managers at larger complexes were supervisors and not within the unit. After an extensive hearing, the Regional Director filed a decision on May 3, 1977 sustaining the unit. Scott's request for review of that decision is still pending before the Board because the Regional Director suspended proceedings when the union demanded a bargaining order without an election in the unfair labor practices case which is the subject of this appeal.

The consolidated unfair labor practice charges concern the company's actions during the period in which the organization activities occurred. Adopting the finding and conclusions of the Administrative Law Judge, the Board found, **inter alia**; that Scott was an employer, within the meaning of the Act, of the employees at the 21 apartment projects; that Scott violated § 8(a)1 of the Act by discharging David and Susan Younce for engaging in protected concerted activities, and by threatening employees with replacement by independent contractors because of the employees' union activities; and that Scott violated § 8(a)(3) and (1) by discharging Clarence Goold because of his union activities. Finally, the Board affirmed the finding that the employees comprised an appropriate unit but that a bargaining order was not justified because the union did not show that it represented a majority of the employees in the unit.

The Board's order requires Scott to cease and desist from the unfair labor practices found, to reinstate and make whole the discharged employees, and to post notices at each of the 21 apartment projects it manages.

Scott contends on appeal that the Board erred in finding that an employer-employee relationship exists between Scott and these employees and that the employees comprised an appropriate unit. It argues that these findings were unnecessary and prejudicial to the company's pending appeal in the representation case, that they were improperly based on the

record and decision in the representation case, and that they are not supported by substantial evidence. We think each of these arguments is without merit.

Scott argues that in light of the Board's denial of the requested bargaining order, it should have abstained from determining whether there was an appropriate unit. It is clear that Scott sought to remove the unit determination issue, which is the subject of its pending appeal in the representation case, from consideration in this unfair labor practices case. The Administrative Law Judge addressed the question, however, and our function is to decide whether his unit determination is supported by substantial evidence. The issue was relevant to the Board's request for a bargaining order and was fully litigated below. That the decision on the request for a bargaining order did not require a unit determination is of no concern to this Court.

The admission of the transcript and exhibit of the hearing in the representation case was not error. The Board need not permit complete relitigation of the unit determination issue. **See Amalgamated Clothing Workers of America, AFL-CIO** v. **N.L.R.B.**, 365 F.2d 898, 905 (D.C. Cir. 1966). The Administrative Law Judge stated that she was not bound by the Regional Director's decision, and Scott was expressly permitted to call witnesses to testify with respect to the appropriateness of the unit.

The Board's findings of an employer-employee relationship and an appropriate unit are supported by substantial evidence in the record. There is ample evidence of Scott's full and centralized control over the employees and that the employees have the common interests necessary to comprise an appropriate unit. Moreover, we agree with the Board that the multi-complex unit would not be rendered inappropriate even if the complex owners are separate joint employers. **See Archdiocese of Philadelphia, et al,** 227 N.L.R.B. 1178. In addition, we find that the inclusion of the assistant managers in the unit is sup-

ported by substantial evidence.

Scott further contends that three of the unfair labor practices found by the Board are not supported by substantial evidence. We disagree. As for the threats made by Marjorie Wrobel, we find it irrelevant that she was friendly with the employees she spoke to and that she eventually married one of them. Section 8(a)(1) prohibits any conduct, friendly or not, which interferes with the free exercise by employees of their rights under the Act. The other two contested findings are firmly supported by the consistent pattern of hostility toward the protected activities by manager Saunders.

Scott also contends that the claims of the Younces that they were illegally discharged are barred by the statute of limitations, by express waiver, and by the doctrine of estoppel. We disagree. Personal service of the charge upon Manager LaFrance at Eureka Townhouses within the six month limit constituted sufficient and timely service upon Scott. See N.L.R.B. v. CLARK, 468 F.2d 459 (5th Cir. 1972). We also agree that the prior withdrawal of the same charge does not constitute a waiver thereof, and we find no waiver of the claim in the record. Finally, we find no reason to invoke the equitable doctrine of estoppel to preclude the Younces from filing the charge a second time.

Finally, the Board's reinstatement order has not been mooted by Scott's partial compliance with it. In addition, we find no reason to conclude that the order to post notices at all of Scott's apartment projects is improper.

Accordingly, the order of the Board should be enforced.

JD-535-78
Detroit, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Seligman & Associates, Inc.
and its wholly owned division,
Scott Management Company

and

Local 79, Service Employees International Union, AFL-CIO

and

David Younce, An Individual

Cases 7—CA—13576
7—CA—13752 (1-4)
7—CA—13948
7—CA—14086

Milton Fischer, Esq. for the General Counsel.
Victor Andrews, International Representative, for the Charging Party Union.
J. Leonard Hyman, Esq., Irwin Alterman, Esq. and **Stanley Slazinski, Esq. (Hyman, Gurwin, Nachman, Friedman & Winkelman** of Southfield, MI, for the Respondent.

DECISION

Statement of the Case

ALMIRA ABBOT STEVENSON, Administrative Law Judge: This consolidated proceeding was heard in Detroit, Michigan, July 11-15, 19-21, August 2-3, and November 11, 1977. The original charge in Case 7—CA—13576 was filed December 8 and served December 9, 1976; the first amended charge was filed December 13, and served December 14, 1976. The charges in Cases 17—CA—13752 (1-4) were filed February 8 and served February 9, 1977. The charge in Case

7—CA—13948 was filed and served April 8, 1977. The charge in Case 7—CA—14086 was filed May 31 and served June 3, 1977. An Order Consolidating Cases Amended Consolidated Complaint and Notice of Hearing was issued June 20, 1977, and duly answered by the Respondent.

On October 7, 1976 David and Susan Younce were terminated from their job at Eureka Townhouses after meeting with other employees to discuss common complaints about working conditions and trying to bring complaints to management's attention as more fully described below. Some weeks later, in mid-November 1976, Clarence "Sam" Goold, an employee of the Utica Green Apartment complex, contacted the Union, and a campaign to organize the employees of apartment projects managed by the Respondent got under way. Meetings of employees with Union representatives were held at the Union hall and other locations throughout December 1976 and in January and April 1977. On December 8, 1976 the Union filed a petition in Case 7—RC—14011 requesting an election in a unit of all maintenance, custodians, caretakers, and grounds men employed at various apartment complexes managed by the Respondent. On January 10, 1977 employees Margaret Lewis and Darrel Ezmerlian were terminated from their jobs at Woodbrook Apartments. On January 14, 1977 Clarence Goold was terminated. A Board hearing was held on various dates from January 20 through March 10, 1977 on the petition filed in Case 7—RC—14011. On January 24, 1977 Mark Rushing's employment at Apple Grove Apartments was terminated. On February 16, 1977 Harold and Madeline Dodson were discharged from the Grosvenor North Apartment complex. In March 1977 employees Lysle Davis and Rodney Johnson were promoted to assistant managers at Fox Lane Apartments and Larry Davis was promoted to assitant manager at Utica Green. On May 3, 1977 the Regional Director issued a Decision and Direction of Election in Case 7—RC—14011 directing an election in a unit which he found appropriate.[1] On May 9 Larry Davis and Ricky

[1] The Regional Director found appropriate the following unit: All full-time and regular part-time assistant managers, assistants to the managers, caretakers, custodians, maintenance personnel and grounds (Cont. on App. 7)

Davis and Ricky Davis were discharged from Utica Green and Charles Davis was fired from Foxlane. Larry, Charles, and Ricky Davis are sons of Lysle Davis. All the employees named above except the Younces were advocates of the Union. The complaint alleges that the Younces were discharged October 7, 1976 for engaging in concerted protected activity; Lewis and Ezmerlian were discharged on January 10, 1977 and Goold on January 9, 1977 because of their union advocacy and in an attempt to gerrymander the unit in the Board election so as to defeat the Union; that Rushing was discharged January 24, 1977 and the Dodsons February 16, 1977 because they supported the Union, attended the hearing in the RC case, and to gerrymander the unit; that the promotions of Lysle Davis, Larry Davis, and Rodney Johnson to assistant managers in March 1977 were further attempts to gerrymander the unit; and that Larry and Phyllis Davis, Charles Davis, and Ricky Davis were discharged May 9, 1977 because of their union advocacy. The complaint also alleges various instancs of interference, restraint, and coercion of employees, and requests a **Gissel** remedy[2] ordering the

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[1] (Cont. from App. 6) personnel employed by the Employer at the following locations: Apple Grove Apts., 1905 Dequindre, Utica, Michigan; Belmont Manor Apts., 250 Church, Belleville, Michigan; Century Sq. Townhouses, 22459 Century Dr., Taylor, Michigan; Congress Hills Apts., 212 Steven Dr., Ypsilanti, Michigan; Eureka Garden Townhouses (Phase 1 & 2), 15007 Aubary Ln., Taylor, Michigan; Fox Lane Apts., 45635 Fox Lane E., Utica, Michigan; Grosvenor North Apts., 94 Stegman Lane, Pontiac, Michigan; Grosvenor East Apts., 30711 Quinkert, Utica, Michigan; Oxford Place Townhouses, 12555 Pine, Taylor, Michigan; Park Hills Apts., 3300 Park Hill Blvd., Wayne, Michigan; Roanoke Apts., (address not in record); Mayfair Apts., 24949 Mayfair Dr., Flatrock, Michigan; Rush More Apts., 15150 Rush More Dr., Taylor, Michigan; San Dee Apts., 16167 Weddel Rd., Taylor, Michigan; Southland Apts. (Phase 1 & 2), 15030 Scott Dr., Taylor, Michigan; Utica Green Apts., 45725 Utica Dr., Utica, Michigan; Utica Plaza Apts., 45220 Keding, Utica, Michigan; Woodbrook Apts., (Phase 1 & 2), 15569 Southland Dr., Taylor, Michigan, but excluding guards and supervisors as defined in the Act. The Employer's request for review is still pending before the Board.

[2] *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575.

Respondent to bargain with the Union in an appropriate unit of employees of 21 apartment-house complexes managed by the Respondent. The Respondent asserts it is not the employer of these employees; denies the commission of any unfair labor practices; and contends that a **Gissel** remedy is not justified and that the overall unit is inappropriate.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the brief filed by the Respondent, I make the following:

Findings of Fact
and
Conclusions of Law

I. Jurisdiction

The Respondent admits, and I find, that it is a Michigan corporation, whose only office and place of business is located at 24315 Northwestern Highway, Southfield, Michigan; that it is a property-management company retained by the owners of apartment and condominium projects in, among other places, Belleville, Flatrock, Taylor, Ypsilanti, Wayne, Utica, and Pontiac, Michigan; and that during the year ending December 31, 1976, a representative period, the Respondent derived gross revenue in excess of $500,000 and received revenues of $6,000 for services performed for customers located outside Michigan. It is clear, and I find, that the Respondent meets the Board's standards for assertion of jurisdiction over the apartment-house industry.[3] The Respondent contends, however, that it is not the employer of the employees employed at the projects involved herein or, in the alternative, that it is a joint employer with the owners of each project separately. Seligman & Associates, Inc., is a Delaware corporation whose stock is traded on the New

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[3] *Karl Gerber, et al, d/b/a Parkview Gardens,* 166 NLRB 697.

York Stock Exchange. Irving Seligman was president and chief operating officer at the time of the RC-case hearing, and chairman of the board, treasurer, and chief operating officer at the time of the hearing in this proceding at which he was the Respondent's only witness. Irving Seligman's son Scott is a vice president of Seligman & Associates, Inc. and president of Scott Management Company division. He is directly responsible to Irving Seligman and the board of directors of Seligman & Associates, Inc.

Seligman & Associates, Inc. is the owner of two of the apartment complexes involved in this case. Each of the other apartment complexes is owned by a separate partnership. Thirteen of these are limited partnerships, Irving Seligman being the general partner in seven and Seligman & Associates, Inc. being the general partner in six of them. Eight are co-partnerships in all of which Irving Seligman is a co-partner, and in three of which Scott Seligman is another co-partner.

All of the apartment-complex owners have contracted with the Respondent to manager their complexes. The owners have retained no veto power nor any control even in a nominal sense over the Respondent with respect to wages, hours, or working conditions of the employees employed at their complexes. In accord with these contracts and its contracts with the Department of Housing and Urban Development for the complexes financed by HUD (all but four of those involved herein), the Respondent hires, pays, supervises, and discharges the employees of the complexes. The Respondent establishes employee classifications which are uniform throughout, and sets salary and wage ranges within which they are paid; it also determines which classifications are to be compensated in part by occupying an apartment. It provides a medical plan and determines eligibility to participate in it. The Respondent also inspects the physical assets of the complex to make sure the employees are working in a manner prescribed, that the units are in rentable condition when there is a vacancy, and that the rents are collected or court or other necessary action is taken to procure the rents or evict

tenants. The Respondent also handles all accounting and bookkeeping, and "generally supervises and does all the jobs that an owner would do" including advertising vacancies under the name of the complex concerned, purchasing all supplies and insurance and hiring subcontractors; preparing information for use of a tax account in making out tax returns of the owners and paying taxes; and preparing reports to HUD. When asked at the hearing herein if the Respondent handles inquiries from unemployment authorities, Irving Seligman replied,

> It would be routinely part of the job. Who else would they talk to? The owner . . . has given us the rights to handle all legal matters for him.

The Respondent maintains a common payroll and accounting system for these projects, other divisions of Seligman & Associates, Inc., and other customers. It pays employees of the complexes with checks drawn on Seligman & Associates, Inc., and provides each employee with a single uncategorized W-2 form for all work performed at any of the apartment complexes. It, however, keeps strict separate account of revenues and expenditures for each complex, which are entered into ledgers and computerized in detail; and it reports monthly and yearly to each partnership on the financial status of its apartment complex. All profits and losses adhere to the partnership owners who are solely liable for wages and other costs of operating the projects.

For these services, the owners pay the Respondent a certain percentage of their gross income, regardless of profit of loss, of their complexes, 5 to 8 percent for HUD-supported complexes depending on the nature of the project. The Respondent employs a staff of about 12 employees who are paid out of its percentage earnings. Its staff includes, in addition to its president and office and clerical personnel, rental agents who work full time or part-time depending on the size of the complex to which they are assigned (on-site managers do the renting at the

smaller complexes) and four property managers. Rental agents use office space at the complexes to which they are assigned. Each property manager is assigned to a group of complexes and he or she, along with Scott Seligman, is responsible for hiring and determining the salary of the on-site managers for his or her complexes. They also transfer managers from one apartment complex to another, fire managers they lose confidence in, and at times promote and transfer employees. Applicants for jobs at all complexes fill out Scott Management Company application forms purchased by the Respondent at lower cost based on volume ordered.

Property managers supervise their projects closely, train and supervise their on-site managers, and visit complexes once a week to check the physical maintenance of the property, review office procedure, and consult with managers on day-to-day operations. It is property manager's responsibility, using his descretion as to whether to consult his manager, to establish a budget for each of the complexes he supervises. Each complex is separately budgeted, and the budgets vary considerably according to size and kind of project, history of the plant, and type of tenant. Each budget specifies salary and wage ranges as well as all anticipated expenditures.

Scott Seligman visits each complex once a month to pep up the managers, discuss their problems with office efficiency and delivery of supplies, inspect the office, apartments, storage, and laundry rooms for cleanliness and neatness, inspect the inventory, and, sometimes, discuss problems with tenants. He also calls monthly meetings of property managers and on-site managers of all complexes together, where "Every conceivable thing that occurs" is discussed, including how to avoid rent-payment delinquencies, security-deposit law, legal actions against tenants, and report forms. At one such session Scott Seligman explained various laws regarding hiring and firing employees, and at another, an attorney discussed ways of defeating the Union-organizing campaign. Scott Seligman also

sends occasional policy memos to on-site managers which they keep in a the form of a manual. Some of these memos are suggestions, such as uniforms and a 4-day week for on-site employees, which managers are free to adopt or disregard. Examples of purported mandatory policies and instructions issued by Scott Seligman were a proscription against hiring a former employee of another complex without a recommendation from the manager of the complex where the employee formerly worked; employment of relations of other employees or managers; and banning the exchange of work or supplies between complexes. Scott Seligman also periodically addresses newsletters to employees of the complexes, and on December 6, 1976 he addressed a letter to all caretakers on Scott Management Company letterhead, notifying them that the Respondent would eliminate their positions and retain independent contractors to perform their work.

Most of the complexes have their own manager in charge of their operations only, although there are several instances where a single manager is in charge of two complexes which are separately owned. The managers and employees of each complex are paid from revenues of the complex where they work. The manager supervises all aspects of his or her complex including all employees working there. As a rule the manager determines how many employees to hire, who is hired, and at what salary or wage; he or she must, however, stay within the complement and wage and salary ranges specified in the budget for the complex. The manager also assigns work, adjusts grievances, grants increases (within the budget range), and disciplines employees. The manager usually is the one who discharges employees, upon occasion even rejecting a property manager's suggestion that an employee be discharged, although property managers also hire and terminate employees. Similarly, there are transfers of employees from one complex to another arranged by property managers which are treated as a termination from one complex and a subsequent hire by another without any continuity of wages or benefits adhering to the

employee. Moreover, despite Scott Seligman's direction to the contrary, managers assign employees to work at other complexes and exchange equipment and supplies upon occasion.

Based on the facts set forth above, I find that the Respondent "exercises full control over the persons employed at" these apartment complexes and, accordingly, "an employer-employee relationship exists between [Seligman & Associates, Inc., and its wholly owned division, Scott Management Company] and these employees." [4] In the exercise of this authority, the Respondent, among other things, determines the nature of employee complement, establishes budgets containing salary and wage ranges, selects and defines eligibility for medical-plan coverage, requires recommendations for the hiring of those previously employed by other complexes, decides to replace caretakers with subcontractors, and provides advice and instructions to managers regarding the Union-organizing campaign. In addition, as found below, the president and project managers on the Respondent's own payroll took a direct part in the commission of unfair labor practices.

In these circumstances, it does not avail the Respondent that (1) the HUD manual under which it operates the HUD-financed complexes provides that on-site personnel will be employees of the project owners; (2) that on-site managers, whose salaries are paid out of the owners' receipts, exercise substantial authority over hiring, firing, wages, and working conditions of employees; or (3) that the authority exercised by the Respondent is characteristic of the inherent nature of the property-management industry and is based on sound business practice. As to (1) the NLRB, in exercising its responsibility to administer the NLRA, and in effectuating the policies of that statute, need

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[4] *J.J. Gumberg Co. et al.*, 189 NLRB 889. See also *Oil, Chemical & Atomic Workers International Union, AFL-CIO (Western Industrial Maintenance, Inc.)*, 213 NLRB 527.

not be governed by requirements and regulations of other agencies of government; accordingly, I have considered the applicable provision of the HUD manual but I have concluded that it does not dictate a conclusion contrary to that required by the facts and Board law.[5] As to (2), the on-site managers derive the authority they exercise over the employees from the Respondent, and not from the owners as the owners have relinquished their authority to the Respondent; even though the managers are paid out of their owners' receipts and not out of the Respondent's percentage fee, there is no evidence that they have ever received any instructions, supervision, or communication from their owners, all directives having come from the Respondent which hired them and exercises full control over their performance through its power to fire them, and to which they are solely responsible. As to (3), this case must turn on its relevant facts and not on whether or not the Respondent's methods of operations are characteristic of the industry of which it is a part or that they are based on sound business practice.

Accordingly, I find that even though the partnership owners of the apartment projects are also employers of the employees of their respective projects by virtue of their voluntary entry into contract commitments with HUD acknowledging such status and their liablity for their employees' salaries and wages, the Respondent is the agent of the partnerships for purposes of controlling the wages, hours and working conditions of the employees employed at the apartment complexes owned by the partnerships, and an employer of these employees within the meaning of the Act,[6] and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding.

II. Labor Organization

The Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act.

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[5] See *Port Richmond Elevator Co.*, Inc., 170 NLRB 1352; Sun Co., 105 NLRB 515; *Earl McMillian Co.*, 81 NLRB 639.

[6] *American Geriatric Enterprises, Inc., et al.*, 235 NLRB No. 206, fn. 2; *J.J. Gumberg Co. et al., supra.* Section 2(2) of the NLRA (Cont. on App. 15)

III. Unfair Labor Practices[7]

A. Section 8(a)(1) Violations

1. Susan and David Younce. The complaint alleges that Lincoln "Ozzie" LaFrance, co-manager and admitted supervisor of Eureka Townhouses,[8] discharged the Younces on or about October 7, 1976, before the Union campaign, because they acted together with other employees to bring employee complaints about working condition to the attention of management, in violation of Section 8(a)(1). The Respondent contends that (1) this allegation is barred by Section 10 (b) of the Act, (2) the Younces have waived any claim they may have had against the Respondent, and (3) the violation was not proved.

As to the Respondent's first defense, the record shows, and I find, that Manager Lincoln LaFrance terminated David and Susan Younce from their employment at Eureka Townhouses on October 7, 1976. The charge in Case 7—CA—13948, upon which this allegation of the complaint is based, was filed by David Younce April 7, 1977, which the parties agree was the last

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[6] (Cont. from App. 14) as amended provides that, "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly...." *Greenhoot*, 205 NLRB 250 and *Shannon & Luchs et al.*, 166 NLRB 1009, relied on by the Respondent, are not apposite because the building owners in those cases, unlike the owners in this case, retained and exercised effective control over wages, hours, and working conditions of employees. The Respondent's comparison of its function with regard to the employees of the apartment projects to the functions normally provided employers by lawyers and accountants is not a valid one because among other reasons lawyers and accountants usually do not have or exercise complete control over the wages, hours, and working conditions of their clients' employees.

[7] In making credibility findings with respect to the unfair labor practices alleged in the complaint, I have taken into consideration the demeanor of the witnesses, and the fact that the Respondent failed without explanation or claim of unavailability to call any of its supervisors to contradict the testimony of the General Counsel's witnesses. In all instances save one which is referred to below, I infer that such testimony would have been unfavorable to the Respondent. *Martin Luther King, Sr. Nursing Center*, 231 NLRB No. 8, fn. 1

[8] The name of Eureka Townhouses has apparently now been changed to Pine Ridge.

day before the expiration of the Section 10(b) period. The complaint alleges, and I find, [9] that this charge was personally served on Manager Lincoln LaFrance, the Respondent's agent, at his office located at Eureka Townhouses, Taylor, Michigan, by Susan Younce on April 7, 1977. It is the Respondent's position that this service was defective because it was not made at the Respondent's "principal office or place of business" as required by Section 11(4), which is alleged in the complaint to be, and is, located at 24315 Northwestern Highway, Southfield, Michigan.

In affirming the Board's conclusion that such a contention is without merit, the Court of Appeals for the Fifth Circuit said, in **N.L.R.B. v. Clark, Owner, Pierce, Trustee of the Ashville-Whitney Nursing Home**, 468 F. 2d 459, at 463:

> ...the statute does not imply, as the respondents suggest, that if process is to be served upon an employer engaged in several enterprises, the server must determine the employer's most important or "principal" site of financial endeavor. Such a determination would be exceedingly precarious and far more technical than fair notice requires. Rather, service is appropriate at the principal place of business of **that particular business** giving rise to the labor dispute with the person required to be served.

Under that ruling, even though Scott Management Company is engaged in many other enterprises, for the purposes of Section 11(4), it could be served at the principal place of business of its Eureka Townhouses operation inasmuch as the paper served related to labor relations of its Eureka Townhouses operation.

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[9] It was the corroborative, credited testimony of Susan and David Younce that on the afternoon of April 7, 1977 they drove together from the NLRB Regional Office to LaFrance's office in Eureka Townhouses; Susan Younce carried a copy of the charge into LaFrance's office; as she entered the office, LaFrance went out and closed the door; after waiting a few minutes Susan Younce gave the charge to LaFrance's secretary and asked her to give it to Manager LaFrance; and the secretary said she would do so.

Nor is there merit to the Respondent's second defense, which is based on the fact that Susan Younce on October 28, 1976 filed, and on November 11, 1977 withdrew, a prior charge containing essentially the same allegations as those in the charge herein filed by David Younce on April 7, 1976. The Respondent cites no case, and I have found none, in which the Board has held the withdrawal of a charge to constitute a waiver of rights guaranteed by the Act. On the contrary, the Board has refused to dismiss a complaint on such a ground. [10]

The facts with regard to the alleged unfair labor practices are as follows: David and Susan Younce were hired in June 1976 by Charles Gaunt, then manager, to work as a caretaker couple at Eureka Townhouses, a 400-apartment complex. David did maintenance work on the grounds and Susan did clerical work in the office. After a week, David was offered a transfer to Scott Security Company as a guard because of his husky size and Susan began training as a security dispatcher working an 18-hour week. Although they both began these jobs working the day shift, they were changed to working different shifts at their request to reduce the cost of babysitters. Toward the beginning of August, Susan was increased to 22 hours, and David asked to be transferred back to maintenance because they could not afford the additional babysitter costs. In September, therefore, Property Manager John Mahaney offered to transfer them back to Eureka Townhouses as a caretaker couple with the duty of cleaning and restoring vacant units. Lincoln LaFrance and his wife Kathy LaFrance had become co-managers of Eureka Townhouses which employed a staff of about 10 employees.

Right off, the Younces encountered difficulty finding babysitters which led to an argument between Susan and Kathy LaFrance over Susan's taking the baby to work with them, culminating in Kathy's firing Susan and Susan's quitting. With

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[10] *Terminal Equipment Inc.*, 219 NLRB 261, 262.

David as mediator, the falling out was patched up, Susan apologized, and Kathy suggested they start over.

In late September, the staff began to discuss among themselves their complaints about working conditions including management's alleged failure to supply them with enough tools and materials to do their work and at the same time threatening their jobs. On the evening of September 27 or thereabouts, a group of six or so employees, including the Younces, met together at the apartment of Michaleen Novak. They dispatched David Younce and another employee to ask Lincoln LaFrance to discuss their complaints with them. LaFrance told the emissaries he could not leave his apartment at the time. So the two men outlined the employees' problems of not having enough tools and cleaning materials and being threatened with discharge if they did not perform more work. LaFrance informed them that Scott Management Company had put him on a limited budget and he could not keep up with the pace employees were using materials. Younce also inquired about layoff rumors he had heard, and LaFrance assured him no layoffs were planned, and that LaFrance was satisfied with Younce's work and would promote him to maintenance man soon. LaFrance promised that he and his wife Kathy would meet with the staff, hear their complaints, and work everything out. The conversation was reported back to the employees at Novak's apartment. Thereafter, the LaFrances' scheduled, and then, canceled, a meeting with the staff for October 1.

Susan Younce, Michaleen Novak, and another employee then decided to try to get Scott Seligman to meet with the employees. Susan Younce was delegated to telephone him, and she called the Scott Managment Company main office at Northwestern Highway in Southfield, Michigan. A secretary informed Younce that Scott Seligman was out of town, and put her on to Vice President Jerry Meltzer. Younce identified herself and told Meltzer she was calling for the employees at Eureka Townhouses, that there were problems there which nothing was being done about, people's jobs were being threatened, and

employees would like him to attend a meeting with them and LaFrance. Meltzer said he could not come but promised to send Property Manager John Mehaney. Although Mahaney visited LaFrance's office on the morning of October 4, the day LaFrance had rescheduled the employee meeting, Mahaney did not attend the meeting.

At the LaFrances' October 4 meeting with the staff, Lincoln LaFrance told the employees, among other things, that they were not to hold meetings after working hours behind the LaFrances' backs or try to tell the LaFrances how to run their jobs.

On October 7, David Younce stayed home sick but Susan Younce went to work, cleaning Lincoln LaFrance's office. About 11 a.m. LaFrance told Susan, as she credibly testified,

> ...that he had received a call from the main office, and that there were troublemakers working for the company, that had to be fired, and he told me that I was the one that made the phone call and I was a troublemaker. He said he knew about it, but he wanted me to come back after lunch with my husband.

After Lunch Susan Younce returned alone to LaFrance's office. She testified:

> [LaFrance] told me that he would have to let me and my husband go because they did not need troublemakers working for the company.

When Susan Younce reported these events to David Younce, he instructed her to go back and get a reason for their termination. Instead, she telephoned Lincoln LaFrance and told him she wanted to know why she was fired. LaFrance responded she was fired "for conspiracy...trying to run the company." He added that David was fired also as they were hired as a couple and had to be fired as a couple.

At about that same time LaFrance instructed Dennis Calhoun to bring Michaleen Novak to his office as he was going to lay her off. At their interview, LaFrance said that Propery Manager John Mahaney was the one who was supposed to let the Younces go and that they were terminated "because...they were causing trouble for the company." [11]

The facts establish that management had no complaints about the Younces' work other than one dispute, 2 months before their termination, about bringing their baby to work, which was immediately resolved. On the contrary, management commended the Younces for their work, granted their requests for jobs and shifts convenient for them, and promised to promote David. A preponderance of credible evidence set forth above clearly establishes that the only reason for the termination of Younces was their concerted activity, beginning approximately a week before, in meeting together with other employees to discuss their complaints about their working conditions "behind the LaFrances' backs," and bringing such complaints to the LaFrances and to top management, thereby becoming "troublemakers" and "trying to run the company." I conclude that the termination of David and Susan Younce on October 7, 1976 interfered with, restrained, and coerced employees in the exercise of their rights under Section 7 to engage in concerted

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[11] The facts with regard to the Younces' termination are based on the mutually corroborative testimony of David and Susan Younce, Michaleen Novak, and Dennis Calhoun. I have considered the factors upon which the Respondent grounds its contention that Susan Younce should be discredited with regard to her termination interview with Lincoln LaFrance, but I find the contention to be unjustified. Other aspects of Susan Younce's testimony were corroborated, and the Respondent, in the discussion of the Younces' terminations in its brief, concedes that "Ultimately, the manager [LaFrance] was upset because one employee called the management company rather than presenting grievances to him . . ."

There is no reliable testimony to support the allegations that Lincoln LaFrance threatened and interrogated employees in December 1976, and these allegations will be dismissed.

activity for their mutual aid and protection, and violated Section 8 (a)(1) of the Act as alleged in the complaint.

2. **Manager Marjorie Wrobel.** The complaint alleges that on or about December 18, 1976 manager of the Belmont Manor Apartments threatened caretakers with replacement by independent contractors because of their union activities. Margaret Lewis testified, in support of this allegation, that shortly before December 8, 1976 while she was employed as a caretaker at Woodbrook Apartments, Wrobel told Lewis and her cousin Mark Trustkowski, a maintenance man at Belmont Manor, that "we were all going to get these letters in the mail and that they were trying to scare us into stopping the union." (The record shows that Lewis and other employees received copies of a form letter dated December 8, 1976 over the apparent signature of Scott Seligman, President of Scott Management Company, advising them that the Company was "eliminating the caretaker system for the preparation of most apartment units" and that caretakers would be replaced with outside contractors for that work.)[12]

Despite the fact that Wrobel signed a Union-authorization card on December 7, 1976, and that Wrobel and Trustkowski were married to each other a month or two after this conversation, and that Lewis and Wrobel were friends (all of which factors might be considered to increase the force of Wrobel's remarks) I find that Manager Wrobel's remarks to these two employees constituted threats which coerced and restrained employees in the exercise of their Section 7 rights, I conclude that Section 8(a)(1) was violated, as alleged.[13]

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[12] Based on the credited testimony of Margaret Lewis. Although Lewis' memory may have been dimmed with respect to certain other events, it seemed quite clear in this respect. The record does not clearly show whether or not the subcontracting plan was ever fully carried out.

[13] The only testimony in support of an allegation that John Gauthier, manager of the Apple Grove Apartments, interrogated employees was that of Mark Rushing whose memory on this point was too poor for reliability. I conclude that this allegation should be dismissed.

3. **Co-Manager Bruce Saunders.** It is alleged that on various dates throughout the period December 1976 to March 1977, Saunders, co-manager with his wife Betsy of the Utica Green Apartments, interrogated employees, threatened them, discriminatorily enforced a too-broad no-solicitation rule, and told employees their union activities were futile. The following testimony was presented by the General Counsel in support of these allegations:

Lysle Davis, a caretaker at Utica Green at the time, testified that shortly after he had attended a Union meeting at the home of maintenance man Clarence Goold during an evening in December 1976, Saunders asked him "what kind of a party we were having at Goold's house"; at a Christmas Eve party at the Utica Green clubhouse attended by most of the staff, Saunders told the employees, "He knew about the Union and he said that it would never get in; that if it did it would take eight to ten years to get in . . ."; somtime in February 1977 just after a new man had been hired, Saunders told the employees, gathered in the clubhouse, "he didn't want us talking union to the new employee . . . He said if anyone got caught talking to him they would be fired." Saunders added he would be "glad when it was all over with" because he was losing too much time having only Larry Davis there to do all the work while the other employees were under subpoena.

Larry Davis, caretaker at Utica Green, testified that during the latter part of November Saunders asked employee Rodney Johnson and him "if there had been a union meeting at Mr. Goold's house, because he had seen [employee] Harold Dodson's truck there"; in early January 1977 Saunders told the employees in the clubhouse "we could get fired for representing the union or talking about the union," or something to that effect; on an afternoon in mid-January Saunders asked Larry and Johnson to come into his office where "he said he had been hearing things about the union -- that we had been talking about the union . . . He said that if he ever heard a word about the union to anybody that comes in or out, he would have us in

the street"; in late January or early February in the clubhouse Saunders told a group of employees, "that it would take seven to ten years before the union got in. Then he said the union would not come in"; toward the end of February Saunders told all the employees in the clubhouse, "Because of the Union, they are going to start contracting the work [of maintenance-caretaker people] out"; in early or mid-March Saunders again called Larry and Johnson into his office after lunch where "he said he would fire us if we talked to anybody about the union. He said he did not want to hear the union mentioned again."

Phyllis Davis, caretaker wife of Larry Davis of Utica Green, testified that in early January 1977, Saunders "asked me if I had anything to do with the union, if I had ever attended a meeting or anything like that and I told him yes I had. Well, he asked me if I thought that we needed one, and I said yes, I think we definitely need one";[14] on March 4, 1977, Phyllis Davis continued, Bruce and his co-manager wife Betsy called an employee meeting at the clubhouse where Bruce Saunders announced that Phyllis and Larry Davis, the Johnsons, and Lysle and Myrl (Merrill in the transcript) Davis were promoted to assistant managers and then told them "he didn't want to hear anything else about the union, and that was done and over with"; on another occasion in March 1977 Phyllis went to the office after lunch with Mary Johnson, caretaker wife of Rodney Johnson, where Saunders "started talking about the union and he said that if it ever did get in, it wouldn't get in for seven to ten years . . . and then said that he felt that Scott Seligman was confident that it wouldn't get in at all"; on March 10, 1977, the day Saunders was scheduled to testify at the RC-case hearing,

> . . . he looked at everybody and he said you might as well go home and he looked at Mary and Rodney Johnson because he was also supposed to testify that day and he told them that they might as well go home and [pack] their bags, and then he just patted Rodney on the back and left.

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[14] This testimony was corroborated by Ricky Davis.

Phyllis testified that on several occasions during the January-March 1977 period, Saunders attributed the subcontracting out of caretakers' work to the advent of the Union.

Ricky Davis, grounds keeper at Utica Green, testified that on an occasion in January at the clubhouse, Saunders,

> commented that [the union] would never come in, and that Seligman & Associates would contract out the work and that that would take care of the caretakers and stuff, and they would have to be let go . . .

Clarence Goold, caretaker at Utica Green who initiated the Union campaign, testified that during the period in January 1977 while the RC-case hearing was in progress, Saunders visited Goold's apartment to order him to vacate the apartment and, noticing Union material on a table, said "I can't understand why anybody wants a union"; when Goold gave several reasons why he wanted the Union, Saunders remarked, "Well, hey, it will never come in anyway."[15]

I find, based on the credited testimony of Larry Davis, Lysle Davis, and Phyllis Davis, that Saunders coercively interrogated employees about their union activities in November and December 1976 and in January 1977. On the basis of credited testimony of Ricky Davis Larry Davis and Phyllis Davis, I find that Saunders threatened the caretakers with replacement by independent contractors because of their union activities during the early months of 1977. I find that Saunders' statements as credibly testified to by Larry Davis, Lysle Davis, and Phyllis Davis to the effect that employees could or would be fired for talking about the Union, and that employees were not to talk to

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[15] I credit the testimony of these witnesses regarding these remarks of the Saunderses as none of them were impeached or contradicted with respect to this testimony all of which forms a consistent pattern of hostility toward unionism by the Saunderses and the Respondent.

new employees about the Union, in January, February, and March were in effect a proscription against employees' exercise of their Section 7 rights.[16] Based on the credited testimony of Phyllis Davis, I find that Saunders' remarks to his staff on March 10, 1977 constituted an implied threat of discharge for testifying at a Board hearing. With regard to Saunders' statements, credibly testified to by Lysle Davis, Clarence Goold, Larry Davis, and Phyllis Davis, at the Christmas Eve party, in January, in late January or early February, and in March, to the effect that the Union would not get in for 7 to 10 years, or would never get in, when considered in light of the other unfair labor practices, particularly Saunders' remark recounted by Ricky Davis tying such a statement to an alleged plan by Seligman and Associates, Inc. "to take care of the caretakers" by contracting out the work performed by them, were more than mere expressions of opinion and were designed and could reasonably be understood as implied threats to use unlawful means to prevent union organization.[17] I conclude that by Manager Saunders' aforelisted statements, the Respondent interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act.[18]

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[16] *Somerset Shirt & Pajama Company*, 232 NLRB No. 177, p. 20.

[17] Cf. *Valiant Moving and Storage, Inc.*, 204 NLRB 1058, 1066, and *Unimasco, Inc.*, 196 NLRB 400, 402, relied on by the Respondent, which are distinguishable inasmuch as the similar remarks in those cases were made in a non-coercive context.

[18] Contrary to the Respondent, testimony by certain employees to the effect that they were not inhibited by Saunders' remarks is irrelevant, as the test of interference, restraint and coercion is not the subjective state of mind of employees, but, rather whether an employer's conduct may reasonably be said to tend to interfere with the free exercise of rights under the Act. *Bon-R Reproductions, Inc.*, 134 NLRB 429, fn. 1; *The Rein Company*, 114 NLRB 694, 698. I recommend that the allegations in the complaint that Saunders threatened employees with the imposition of more onerous working conditions if the Union-organizing drive was successful be dismissed for lack of evidence. I do not credit Ricky Davis' testimony that Saunders threatened to break Larry Davis' leg if he testified at the Board hearing. Larry Davis did not corroborate this testimony, and there is no other evidence (Cont. on App. 22)

B. Section 8(a)(1), (3) and (4) Violations

1. **Margaret Lewis and Darrel Ezmerlian.** Lewis was first employed February 2, 1976 at Eureka Townhouses with her cousin Mark Trustkowski as a caretaker couple. They were transferred to the Rush More complex, back to Eureka, and then permanently to Woodbrook Townhouses where Howard and Lucy Morrow were co-managers. Howard Morrow fired them both in May when Lewis reported to Morrow that Trustkowski was taking a half day off to get some X-rays because he was in an automobile accident. They appealed to Property Manager Moss Jacobs who instructed them to get a doctor's certificate and when they did, rehired them at Oxford Place. They were subsequently transferred to permanent employment at Belmont Manor where Marjorie Wrobel was manager. In June 1976 Wrobel laid Lewis off but kept Trustkowski on as maintenance man. A month or so later, Lewis applied to Jacobs with a new partner named Joe Workman, and Jacobs hired them to work at the San Dee complex as a caretaker couple. After a week at San Dee, Lewis took a week's vacation with permission of the manager; when she returned, Workman had been terminated. Without giving her a reason for Workman's termination, the manager offered to keep Lewis on if she could find another partner. She could not find one, and was terminated. In August, Howard Morrow hired Lewis and Darrel Esmerlian as a caretaker couple at Woodbrook Townhouses.

Between August and the time the union activities started, Lewis testified, the Morrows terminated close to 20 caretaker couples for one reason or another, and fired one couple because they could not work the afternoon before Christmas 1976 for lack of a babysitter.

On November 20, 1976, Lewis and Ezmerlian signed Union-

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[18] (Cont. from App. 21) which would tend to support the likelihood that Saunders made a threat of this kind. I therefore also recommend that this allegation be dismissed.

authorization cards. Lewis attended Union meetings and was one of a group of Woodbrook employees, consisting of Craig and Debbie Feebish and Mark Rushing, who actively solicited cards at various apartment complexes of the Respondent. Lewis testified that on Saturday, December 4 or Monday, December 6, Lucy Morrow handed her two Union-authorization cards signed by other employees which Lewis had inadvertently left in the office on December 4. On several occasions Lucy Morrow told Lewis the Union would be a good thing as did Marjorie Wrobel who signed a Union-authorization card at Lewis' request.

On Monday, January 10, 1977, Lewis reported for work without Ezmerlian, who had spent the weekend out of town and because of a heavy snow fall the night before the roads were not clear and he could not make it in to work. Ezmerlian telephoned Lewis about 11 a.m. or 12 noon to say he would be at work by 1 p.m., and Lewis told him they had been fired; he arrived at work between 1 and 4 p.m. and asked Howard Morrow why they were terminated. Morrow replied, "There is no excuse not to call in, and to miss a day without calling in." Although Ezmerlian explained he was stranded by snow, Morrow said, "no, no way. He said they had to let us go." It seems agreed that caretakers usually are hired and fired as couples.[19]

The evidence shows that both Lewis and Ezmerlian signed Union-authorization cards, and that Lewis was one of the more active organizers as management had reason to know. In the absence of evidence that Ezmerlian's Union advocacy consisted of anything more than signing a Union card or that management had any reason to suspect him (other than the fact that he lived with Lewis), the General Counsel's theory doubtless is that the Respondent seized on Ezmerlian's lateness as a pretext to rid itself of Lewis to discourage union activity. Although I have

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[19] Lewis' work history is based on her own testimony. Where her account of their termination differs from Ezmerlian's, I credit Ezmerlian.

carefully considered this possibility in light of all the evidence, including the other unfair labor practices committed by the Respondent, I cannot agree that the theory is supported. Thus, while it probably seems hard that these employees were fired for such seemingly excusable conduct, Lewis' own testimony regarding the Morrows' past conduct demonstrates them to be quick to discharge employees and evenhandedly hard on absenteeism whether seemingly excusable or not. It is also clear that it is the Respondent's general practice to hire and fire caretaker couples together and that Lewis had been on the receiving end of this policy by other managers of the Respondent before the advent of the Union. As Ezmerlian was guilty of the infraction given as the reason for the discharges, and as the record fails to show disparate treatment of Lewis and her partners before and after knowledge of her union activities or between Lewis and Ezmerlian and employees not known to be Union advocates, I find that this allegation is not supported by a preponderance of the evidence, and I conclude that it should be dismissed.

2. **Clarence "Sam" Goold.** Goold was hired in August 1975 as caretaker at Utica Green Apartments where Bruce Saunders was co-manager. In September 1976 Scott Seligman complimented his performance. His relationship with Saunders became strained shortly after that because their wives could not get along and Saunders once criticized his work. However, Goold was promoted to maintenance man and given a $25 increase in his monthly salary.[20] He thereafter became distraught and began to miss work because his wife left him, and Saunders assigned him to do painting work in order, he explained, for Goold "just to be alone and get [his] thoughts together," assigning Lysle Davis to catch up on the maintenance work.

As stated, it was Goold who made the first contact with the Union on November 10, 1976. He obtained authorization cards

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[20] Saunders told Goold that only he and one other employee, a security guard, received increases at the time.

from the Union on November 15 and thereafter handed out cards and Union literature to 80 to 85 employees, driving from complex to complex. He attended all but one of the six meetings between the Respondent's employees and Union representatives. In early December, Property Manager Dave Whitman (or Wickman) expressed satisfaction with Goold's work. Then, on December 18, 1976, a Union meeting was held in Goold's home at the Utica Green Apartments, and, as found above, Saunders had knowledge of it.

The next day, on December 19, 1976,[21] Goold was in an automobile accident driving a friend's car to pick up a snake needed to unplug a toilet in a Utica Green apartment. Although he was paid through December 1976, Goold has not worked for the Respendent since then. He gave a doctor's slip for indefinite medical leave to Bruce Saunders as well as to Sharon Campbell who apparently was the rental agent at the time.[22] Goold was paid through December, but when Saunders gave Goold his last paycheck on January 14, 1977 (representing the Employer's hold back for the employee's first week of work) he told Goold that would be his last check, that he was being laid off indefinitely, and that he wanted Goold out of his apartment. [23] Goold said he would vacate the apartment when his doctor said he could move. Saunders resonded, "Oh, ya, the doctor can write anything." Goold said Saunders could call his doctor and verify the medical slip he had given Saunders. On approximately January 22, 1977, Goold telephoned Jeff Adler, an officer of the Company, who told him he had not been laid off but had been terminated for unsatisfactory work. He has not received

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[21] Although the date of Goold's accident is given as December 9 at one place in the transcript, the weight of the testimony places the date as December 19, 1976.

[22] Lysle Davis corroborated in part Goold's testimony to this effect.

[23] No reliance is placed on Saunders' testimony at the RC-case hearing that he told Goold on December 20 or 21 that he was terminated, in view of the Respondent's failure, without explanation or claim of unavailability, to produce Saunders as a witness in this proceeding.

either workmen's or unemployment conpensation.

Larry Davis testified that although Saunders told the employees around Christmas that "that Goold was no longer with us" because Goold was not doing his work and had been taking a lot of time off, Saunders later, in early January, told him and employee Rodney Johnson that Goold "wasn't through with the Union . . . he [was] still trying to get Rodney Johnson and Lysle Davis to go to a hearing." Lysle Davis testified that Saunders told the employees on one occasion that Goold was being laid off permanently and then later said Goold was going to be indefinitely on medical leave. In late February, Phyllis Davis overheard co-manager Betsy Saunders tell someone over the telephone that Sam Goold "was no longer working for the company, but it was all his fault because of the union."[24]

The above evidence shows that it was Goold who initiated the Union campaign among the Respondent's employees and that he was among the most active in the campaign. It also shows that although Goold's otherwise friendly relationship with Saunders and acceptable work record suffered during a period in October and November because of family problems, Saunders did not discharge him but gave him another job assignment so that he could pull himself together and thereafter he was complimented by the project manager.

Goold's next problem arose, however, after a Union meeting was held at his home, and although Goold suffered a disability through no fault of his own as far as the record shows in the performance of his employment duties, the Respondent was unforgiving. Although provided with verification, Saunders ex-

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[24] I credit the above testimony by the General Counsel's witnesses which is essentially mutually corroborative. Although Goold's testimony with respect to obtaining signatures on Union-authorization cards was not always clear cut, there is no reason to believe that he was not truthful about the events set forth here.

pressed skepticism about Goold's injury at the same time declining Goold's invitation that he check with the doctor. The vastly different treatment thus accorded Goold in somewhat similar circumstances before and after his known union activity, when considered together with the conflicting statements given by management as to Goold's employment status thereafter, lead to the inevitable conclusion that the reasons advanced by the Respondent for Goold's termination were a pretext to conceal the real reason which was his leadership in the Union movement, as Saunders subsequently revealed to three employees. In this state of affairs and in view of the other unfair labor practices committed including those by Manager Saunders himself, I find that the termination of Goold on January 14, 1977 was discriminatorily motivated to discourage employees' union activity, in violation of Section 8(a)(3) and (1) of the Act.

3. **Mark Rushing.** Rushing had apparently worked for Scott Management Company at its Century Square complex sometime in the past as an assistant manager; he quit that job because of a dispute with the manager. On April 6, 1976 he was hired as a caretaker at Woodbrook II, where, he testified, he did not see eye-to-eye with the manager on "personal matters" and "I guess he was going to fire me," so Rushing transferred to the Apple Grove complex where John Gauthier was manager.

On November 20, 1976, Rushing met with other employees to discuss complaints against the Company, and Margaret Lewis gave him a Union-authorization card. He signed the card December 7, 1976, and subsequently gave out cards to other employees.

Around the middle of January 1977 while Rushing was driving a Company jeep to remove snow at the complex, the transmission failed, and when Gauthier took the jeep for repair he was told that a driver would have to hit something awfully hard to cause such a failure.

Rushing was among the group of employees who helped the

Union prepare for the RC-case hearing. He was subpoenaed to appear in that matter January 20, 1977, and he told Manager Gauthier that he was subpoenaed to go to court. Gauthier replied that Rushing was taking too much time off from work. When Rushing came to work the next day, January 21, 1977, Gauthier told him to go home, that Gauthier would call and talk to him later as Gauthier had to speak to Herb Collins, the property manager. Rushing reported on the morning of January 22, but Gauthier sent him home again, saying he would call later as he still had to talk with Collins. On Monday morning, January 24, Rushing once more reported for work and this time Gauthier said, "That he is going to have to terminate me . . . that Herb Collins told him to terminate me and he said he was going to lay me off," and that Rushing would get paid through the week he did not work. Rushing had never been disciplined, and he never received an explanation for his termination.[25]

Rushing was active in the Union campaign, signing a card and soliciting signatures of other employees, and helping the Union prepare for the RC-case hearing. Although there is no indication of Employer knowledge of those activities, I infer, and find, that when he revealed on January 20, the first day of the RC-case hearing, that he had been subpoenaed to go to court, management immediately correctly concluded that he was scheduled to testify on behalf of the Union in that proceeding. Manager Gauthier thereupon charged him with excessive absenteeism although there is no information of absenteeism or prior accusations of absenteeism. Moreover, even though Rushing had conflicts with two other Scott Management Company managers in the past, there is no evidence of a conflict with Gauthier and Rushing's one transgression -- damaging the jeep -- had been passed over without remonstrance. These facts, along with Gauthier's effectively barring Rushing from the

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[25] Based on testimony of Rushing. I do not credit his testimony that Gauthier told him on one occasion that the Union was no good, as that testimony was considerably undermined on cross-examination.

premises until he could convey the new intelligence to his property manager and his failure to give any reason for Rushing's termination, require the conclusion that the real reason for Rushing's termination was his subpoena to testify at an NLRB hearing in support of the Union's cause. I conclude that the termination was a violation of Section 8(a)(4) and as the intent and effect was to discourage activity in support of the Union, a violation of Section 8(a)(3) and (1) as well.

4. **Harold and Madeline Dodson.** The Dodsons were hired by Manager Bruce Saunders October 5, 1976 to work as a caretaker couple at Utica Green Apartments. The Dodsons voiced many complaints about the working conditions including the lack of tools to get the job done, not getting training they were promised, the Company's refusal to pay utility bills on their apartment, and not feeling accepted by, and being incompatible with, the younger employees.

Beginning on November 17, 1976, Sam Goold paid several visits to the Dodsons advocating the Union. On November 19, 1976, they signed Union-authorization cards. Two days after they attended the first Union meeting at the Union hall in Detroit (they attended two or three more meetings after that), Saunders read to the staff of the complex the letter signed by Scott Seligman that the Company planned to do away with the caretaker system and contract help from the outside. Madeline Dodson asked if the Company would not have to hire unionized help, but Saunders responded, "No, we can get around that." Betsy Saunders added that she and her husband would try to place all of their caretakers as assistant managers in other complexes as they were good workers.[26]

Three days later, on December 9, 1976, at 5:30 p.m. Saunders

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[26] According to Phyllis Davis, Betsy Saunders told her and Mary Anne Johnson in late December that if they were transferred, she would see that it was to a nice place and added that if everybody was transferred, maybe it would break the Union up.

ordered the Dodsons to report to the Grosvenor North complex the next morning as assistant managers. Although Saunders had told Property Manager Neilson that the Dodsons were slow workers and constant complainers, they were greeted on arrival at Grosvenor North by Managers Frank and Mary Ann Slanda and by Neilson who told them they had been promoted and they could disregard the Seligman letter about being replaced by a subcontractor. The Dodsons nevertheless performed the same caretaker duties they had performed at Utica Green with no increase in pay or moving expenses. They complained to the Slandas about these matters and about not having the tools to do their work. Frank Slanda once told Harold Dodson he hoped the Company did not call in outside help as he preferred caretakers. Thereafter Frank Slanda remonstrated several times with both Dodsons for being slow. Around midnight on January 19, Slanda telephoned Harold Dodson and told him to go out and snowblow the sidewalks. Dodson protested that it wasn't snowing enough and the wind was still blowing. After accusing Dodson of crying about his job, Slanda agreed to let Dodson use his own judgment as to when to clear the walks.

Harold Dodson attended the first two sessions of the RC-case hearing beginning January 20, 1977, under a Union subpoena. He testified at the third session, held on February 8, 1977. The next day when he gave Frank Slanda the future hearing schedule and informed him that Madeline Dodson had also been subpoenaed, Frank informed Harold that their attending the hearing would count as their days off.

The Dodsons were terminated February 16, 1977, 8 days after Harold Dodson testified contrary to the Company's interests in the RC-case hearing. They were summoned to the office where they found the Slandas and Neilson and where Neilson informed them of their termination. They asked the reason, and Neilson said they would get the reason in a letter. They never received the letter. Later, Neilson told them they were terminated "due to paperwork" and they "didn't complete the job." The only paperwork Dodson knew of was the service

reports he was required to make out every day by listing on a sheet posted in a closet requests for parts he needed and the jobs he had done that day. Dodson testified that he made the required reports every day the sheet was posted but that sometimes no sheet was posted in the closet. Dodson testified he never refused to do anything Slanda told him to do, except once in January when he had been assigned duties after quitting time on three occasions in a week, without extra pay, and he told Slanda he was not going on doing that night after night. The Dodsons were never disciplined or warned that their jobs were in danger at either Utica Green or Grosvenor North.[27]

Although the Dodsons were fairly active Union adherents, the evidence as I see it fails to establish that the Respondent was aware of it until January 20, 1977 when Harold Dodson attended the RC-case hearing. Although two on-site managers considered them slow workers, and although it is clear that they were constant complainers at both sites, these faults were tolerated, and apparently played no part in the decision to terminate them. Indeed, the reasons given for their discharge do not make much sense. To the extent they were meant to convey failure to perform or perform properly required paperwork, Harold Dodson explained its falsity, and there is no basis for the accusation of failure to complete any job to which either was assigned. As the reasons given by the Respondent for the discharges therefore do not stand up, I infer and find on the basis of the timing of the discharges shortly after Harold Dodson testified contrary to the Respondent's interests at the RC-case hearing and notified management of the future RC-

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[27] I credit the above mutually corroborative testimony of Harold and Madeline Dodson. I do not credit Harold Dodson that Bruce Saunders told him in January, in Madeline Dodson's presence, that Saunders had seen Dodson's car at Sam Goold's home and asked if they were attending a Union meeting there, as the testimony was not corroborated by Madeline Dodson and was inconsistent with a statement in Harold Dodson's pretrial affidavit that Saunders never said anything to him personally about the Union.

case hearing schedule at which Madeline Dodson was also subpoenaed to testify on behalf of the Union, and in the absence of any other triggering event, that the Dodsons were terminated because of Harold Dodson's testimony and in anticipation of his and Madeline Dodson's future testimony for the Union at the RC-case hearing. I conclude that these discharges, on February 16, 1977, were also violative of Sections 8(a)(4), (3) and (1) of the Act.

5. **The Davises and Johnsons.**

(a) **Lysle Davis and Rodney Johnson.** Lysle and Mryl Davis were hired by Manager Bruce Saunders as a caretaker couple at Utica Green in June 1976. Rodney and Mary Johnson were another caretaker couple at Utica Green. The Davises began discussing the Union with Sam Goold early in November. On November 17, Lysle signed a Union-authorization card at Goold's behest. Thereafter, Mryl signed a card and the two of them accompanied Goold when he obtained the signatures of Larry and Phyllis Davis and Rodney Johnson on November 17 and 18. The Davises attended two Union meetings, one at the Union hall and one at Goold's home.

Manager Saunders made Lysle a maintenance man at the time Goold was switched to painting, and Saunders implied he was going to make the Davises assistant managers at Utica Green but I construe Lysle Davis' testimony as indicating that they never were made assistant managers there.

Lysle Davis and Rodney Johnson attended the RC-case hearing, under subpoena, and Saunders asked Johnson after every session what happened there. On a date in February, Scott Seligman asked Lysle to meet him in the rental office of the Fox Lane complex which was under construction across the street from Utica Green. At the meeting Bruce Saunders, who was also acting as manager of Fox Lane temporarily, was also present. Seligman informed Davis that he and his wife would be transferred to Fox Lane as assistant managers. Early in March,

Saunders announced to the Utica Green staff that Lysle Davis was assistant manager of Fox Lane; the Johnsons assistant managers there under Davis; and that Larry and Phyllis Davis were assistant managers at Utica Green.

Lysle Davis testified that in his opinion both he and the Johnsons earned their promotions to assistant manager and deserved them. Lysle Davis subsequently became manager of Fox Lane.[28]

(b) **Larry and Phyllis Davis.** On August 24, 1976 Bruce Saunders hired these Davises as a caretaker couple at Utica Green. As stated above, Lysle and Mryl visited them on November 17 or 18 with Clarence Goold to discuss unionization and both signed Union-authorization cards. Larry thereafter accompanied Goold to several of the other Scott Management Company apartment complexes passing Union cards among employees. Larry and Phyllis Davis also attended Union meetings at the Union hall in Detroit and at Goold's home, and advocated the Union in conversations with employees.

As found above, Saunders made the Larry Davises assistant managers at Utica Green in early March at the same time the Lysle Davises and the Johnsons were made assistant managers at Fox Lane. Subsequently, on April 5, 1977, Scott Seligman and Property Manager Dave Whitman informed Larry and Phyllis that the Saunderses had resigned and they were managers in charge of Utica Green. Joanne Patterson succeeded Whitman as property manager, and on May 1, Larry Davis notified her he wished to return to maintenance work. After checking with Scott Seligman, Patterson agreed. Larry Davis was transferred to maintenance and given a pay increase bring-

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[28] I credit the corroborative testimony of Larry and Phyllis Davis. No reliance is placed on testimony of Phyllis Davis as to a subsequent conversation she had with Property Manager Patterson about the reasons for the discharges of Larry, Ricky and Charles Davis as that testimony was ambiguous.

ing his salary alone to more than he and Phyllis had been making together. Patterson informed Phyllis (who was pregnant) she would not have to work any more; Phyllis asked if that meant she was laid off; Patterson said she preferred her to resign and promised a letter of recommendation. Phyllis Davis did not work after that.

On May 9, 1977, Acting Manager Sharon Campbell called Larry and his brother Ricky Davis into the office and told them, according to Larry, "it was not her decision, but . . . you guys are terminated" adding that "she had no reason" and was only following Joanne Patterson's orders.[28]

(c) **Ricky Davis.** Manager Saunders hired Ricky Davis July 12, 1976 as a grounds keeper at Utica Green where his father and mother Lysle and Mryl Davis worked as a caretaker couple. Ricky was present when Clarence Goold solicited Lysle and Mryl Davis to sign Union-authorization cards, and Ricky also signed a card, on November 18, 1976. Thereafter Ricky attended five or six of the Union meetings. Saunders was told of Ricky's Union involvement at the Christmas or New Years' party.

In April 1977, when the Saunderses left Utica Green and Lysle and Mryl Davis were placed in charge, Ricky was moved up to caretaker. As found above, on May 9, after the elder Davises had been transferred to Fox Lane, Ricky was terminated along with Larry Davis, by Sharon Campbell without being given any reason.[29]

(d) **Charles Davis.** In late March or early April 1977 Property Manager Dave Whitman and Manager Bruce Saunders told Lysle Davis to get a maintenance man for Fox Lane. They agreed to Lysle's suggestion that he could persuade his son Charles to quit the job he had to come to work there. After

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[29] Based on the credited testimony of Ricky Davis, corroborated in part by Larry Davis.

three or four weeks, Charles agreed and was hired April 18, 1977 as maintenance man at Fox Lane. Three weeks later, on May 9, after Saunders had resigned and Joanne Patterson had succeeded Whitman as property manager, Patterson told Lysle Davis she understood he had his son working there, and "we have a policy of not hiring relation[s] and that I want him discharged as of now." Lysle protested that Charles' employment had been okayed by Whitman and Saunders, but Patterson responded, "They are not with us any more." Lysle informed Charles of his discharge that same day, giving as the reason that Patterson said, "they didn't want relations working there." Lysle Davis to the Respondent's knowledge had worked with his sons Larry and Ricky at Utica Green, and he was aware of no rule against it until this incident. Larry Davis testified, however, that he asked Bruce Saunders several times in March 1977 for a transfer to Fox Lane after his father was made assistant manager there, and Saunders refused on the ground that, "they do not want relations working together." Clarence Goold credibly testified that David Harris, the brother of Kathy LaFrance, co-manager of Eureka Townhouses was employed as a maintenance man at Oxford Place.[30]

(e) **Conclusions.** Johnson and all the Davises except Charles who was not hired until March or April 1977 were among the original Union advocates and active supporters of the Union campaign. That this was known to management was revealed by the interrogation and threats to which they were subjected by Co-Manager Bruce Saunders as found above.

I agree with the General Counsel that the Respondent intended to convey the impression, and the employees understood, that the announced reclassification of Lysle and Larry Davis and Rodney Johnson from caretakers to assistant managers

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[30] I credit the above mutually corroborative testimony of Charles and Lysle Davis and Clarence Goold. The General Counsel failed in his efforts to establish through the testimony of Goold that Harris is now employed at Eureka Townhouses.

were promotions whether or not the Respondent meant to or ever did give them increased responsibility or pay which might be expected to result therefrom. In determining why the Respondent decided to make these changes it is not relevant that Lysle Davis was of the opinion that both he and Johnson deserved to be promoted because he had no part in the decision. The evidence in this record clearly shows that it would have been out of character for the Respondent to promote or transfer known Union advocates on the basis of merit at that time. Thus, in March 1977 the Respondent was virgorously contending in the RC-case proceeding (as it is herein) that assistant managers are supervisors and not includable in any unit found appropriate or eligible to vote in an election. Moreover, although Co-Manager Betsy Saunders at one point attempted to create the impression that good caretakers wold be reclassified as assistant managers to save them from replacement by subcontractors, the true reason was revealed by the threats to replace the caretakers with subcontractors because of their union activity, by Betsy Saunders' telling Phyllis Davis and Mary Ann Johnson it might break the Union up if everybody was transferred, and by Bruce Saunders' telling his staff, when he announced these reclassifications, that he, "didn't want to hear anything else about the Union," and that that now "was done and over with," and by the other unfair labor practices found above.

I therefore find that the Respondent made Lysle Davis, Larry Davis, and Rodney Johnson assistant managers on March 4, 1977 in an attempt to gerrymander the unit so as to defeat the organizational efforts of the Union, and I conclude that it thereby violated Section 8(a)(1) as alleged in the complaint.[31]

With regard to the discharges, I agree with the Respondent

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[31] In my opinion, the record fails to substantiate the contentions that any of the other unfair labor practices found herein were motivated by an attempt to gerrymander the unit.

that Phyllis Davis was not discharged along with the others on May 9, 1977 as she was no longer on the Respondent's payroll at that time, and her May 1 termination is not alleged and the evidence does not show it to be unlawful. As to the three Davis brothers who were all discharged May 9, 1977, the Respondent argues that Charles was terminated "because of a Scott Management Company policy that a manager could not hire relations to work under him." It contends that Larry and Ricky were fired for unsatisfactory work; it concedes that the record does not reflect the underlying basis for this conclusion but insists that if it were going to fire them for union activity, it would have done so back in December 1976 when their union activity became known.

Regarding Charles Davis, the evidence shows that the reason given by Property Manager Patterson for Charles' discharge was not that there was a policy against a manager's hiring a relation to work under him, but that, "We have a policy of not hiring relation[s]." Nor had Larry Davis been told by Saunders that there was a policy against a manager's having a relation working under him; he was told there was a policy against relations working together. That there was no such policy as that voiced by Patterson is shown by management's approval of the hiring of Lysle Davis' son Charles only 3 weeks before Lysle was told to discharge him, and by the employment of Kathy LaFrance's brother. That there was no such policy as that voiced by Saunders is shown by the concurrent employment of Lysle, Larry and Ricky at Utica Green during the summer of 1976.

None of these purported policies about employment of relations are advanced as the reason for the discharges of Larry and Ricky Davis. Moreover, there is no credible evidence that their terminations were for unsatisfactory work as the Respondent contends. Indeed, Larry had recently been promoted and the Respondent concedes there is no evidence to support any such charge against either Larry or Ricky.

No truth having been found in the reasons advanced for these

three discharges, and in view of the timing thereof 6 days after the Regional Director issued his Decision and Direction of Election under which all three would have been eligible to vote, the Respondent's knowledge that two of them, and their father, were Union advocates and the justified inference that Charles was suspected of being of like mind to the rest of the family, and the other unfair labor practices committed by the Respondent, I find that the Respondent discharged Larry, Ricky, and Charles Davis May 9, 1977 because of their known or suspected support of the Union, in violation of Section 8(a)(3) and (1) as alleged in the complaint.

IV. Remedy

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (4) of the Act, I shall recommend that it cease and desist therefrom, and in view of the nature and extent of the violations, from any interference with the rights of its employees guaranteed by Section 7 of the Act, and that it take certain affirmative action designed to effectuate the policies of the Act. Nothing in my recommended Order shall be taken as justification for the reduction of benefits presently enjoyed by any of the Respondent's employees. Inasmuch as the Respondent's unfair labor practices directly affected many employees at seven of its apartment complexes, in view of the nature and extent of the unfair labor practices found, and as they were committed by the Respondent's managers, project managers, and president, I find no merit in the Respondent's contention that notices should be required only in those complexes where unfair labor practices were committed, and find that the policies of the Act will best be effectuated by requiring that notices be posted in all 21 complexes employing unit employees.

Having found that the Respondent violated Section 8(a)(1) by discharging David and Susan Younce, Section 8(a)(3) and (1) by discharging Clarence Goold, Larry Davis, Ricky Davis, and Charles Davis, and Section 8(a)(3), (4), and (1) by discharging Mark Rushing, Harold Dodson, and Madeline Dodson, I shall

recommend that it offer them immediate, full, and unconditional reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges; and make them whole for any loss of pay suffered by reason of the discrimination against them, in the manner described by **F.W. Woolworth Co.**, 90 NLRB 289. Interest will be paid as provided in **Florida Steel Corporation**, 231 NLRB No. 117; see generally **Isis Plumbing & Heating Company**, 138 NLRB 716. Whether or not the Respondent has made adequate offers of reinstatement to some of the discriminatees as it claims, had best be left to the compliance stage as this matter was not fully litigated.

The General Counsel requests that as part of the remedy for the unfair labor practices committed, the Respondent be ordered to bargain with the Union as the exclusive representative of the employees in the unit found appropriate by Regional Director in his Decision and Direction of Election in Case 7—RC—14011. The Respondent contends that that unit is not appropriate, that in any event the Union does not represent a majority of employees in that unit, and that a bargaining order is not justified.

I have carefully reviewed the entire record in this proceeding as well as in Case 7—RC—14011 including the Respondent's contentions such as that the apartment projects where these employees work are owned by separate legal entities; some are located as far as 60 miles from others; the projects are of various sizes and rentals, and cater to tenants of varying economic status; some are HUD regulated and some are not; the Respondent keeps strict account of the income and expenditures of each complex separately; a substantial amount of the hiring and firing is done by the on-site managers who determine specific wages and are the employees' immediate supervisors. However, based on the Respondent's centralized method of operating, its central control of labor policy including wage and salary ranges, benefits, replacement of classifications of employees by subcontractors, and its authority to require recommendations before hiring, its coordinating of operations

through monthly manger meetings, directives, and recommendations, the over all supervision of employees exercised by Scott Seligman and the property managers, the authority of some on-site managers over more than one complex and the transfer of managers, the borrowing and sharing of work, supplies, and equipment, the similarity of employee duties, classifications, and their wages, salaries, and benefits, and the interchange in transfer of employees, I find that the employees employed at the 21 apartment complexes managed by the Respondent in the metropolitan area of Detroit share common interests in their wages, salaries and working conditions, and therefore comprise an appropriate unit, as found by the Regional Director and alleged in the complaint.[32]

The relevant credible evidence establishes, and I find, that the assistant managers and assistants to managers are at most leadmen or straw bosses, and fails to support the Respondent's contention that they are supervisiors within the meaning of Section 2(11) of the Act. They are therefore properly included in the unit.

The General Counsel offered signed Union-authorization cards,[33] to establish the majority status of the Union on the

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[32] *Roman Catholic Orphan Asylum of San Francisco d/b/a Mount St. Joseph's Home for Girls,* 227 NLRB 404; *Chatham Towing Company, Inc. a wholly owned subsidiary of Colonial Oil Industries, Inc.,* 226 NLRB 502; *U-Tote-Em Grocery Co., division of Malone & Hyde, Inc.,* 185 NLRB 52. Contrary to the Respondent's contention, the multi-complex unit would not be rendered inappropriate even if the complex owners are separate joint employers, along with the Respondent, of the employees of their complexes. *Archdiocese of Philadelphia et al.,* 227 NLRB 1178. No party contends that the employees of Goddard Court Apartments, or Dupage Green or Woodbury Condominums, exluded by the Regional Director, should be included in the unit.

[33] The Respondent's challenge to the following cards is without merit: The Respondent challenged the card of Mark Trustkowski because it was signed at the apartment and in the presence of Marjorie Wrobel, the manager of the complex where he worked and his supervisor, and because (Cont. on App. 45)

dates referred to below. There is in evidence an employee list for the pay period ending December 3, 1976, which shows that on that date the Respondent employed 109 employees in the classifications specifically included in the appropriate unit of 21

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[33] (Cont. from App. 44) Wrobel herself signed a card and told the four employees present that the Union was a good idea and that she thought there should be a union at the Company. As Trustkowski's signature was solicited by his cousin employee Margaret Lewis and not by Wrobel, as Wrobel did not take an active part in the Union campaign, as there is no hint that Trustkowski signed out of fear of reprisal by Wrobel or the Respondent for refusing to do so, I find his card valid. *N.L.R.B.* v. *WKRG-TV, INC.*, 270 F. 2d 1302 (C.A. 5); *Independent Sprinkler & Fire Protection Co.*, 220 NLRB 941. I have examined with care *Insular Chemical Corporation*, 128 NLRB 93, *Raymond Buick, Inc.*, 173 NLRB 1292, and other cases to which the Respondent has referred me and have concluded that they are distinguishable on their facts. There is no probative evidence in support of the Respondent's challenge to card of Michael Bodell. Although there is evidence which creates some doubt about the cards of Frank and Dolores Thatch, on the whole I credit Mark Rushing's testimony that he knows them and that they signed their cards in his presence. As Craig Feebish, assistant manager, is not a supervisor, I find his card valid, and the cards of Debbie Feebish, Margaret Lewis, and Gordon Brown valid though signed in his presence with his encouragement. That Terry Smith signed a card on February 14, 1977, too late to be relevant, does not detract from the validity of the card she signed earlier on December 7, 1976.

Challenges to the following cards were sustained at the hearing: A card bearing the name Verna Porter dated December 7, 1976, because she was not an employee of the Respondent; cards bearing the names Micky Caldwell, Debbie Williams, and Murray Young all dated December 7, 1976 were not properly authenticated; cards signed by Janet Smith on February 14, 1977 and Robert Drude on April 17, 1977 were too late. Challenges to the following cards are now sustained: The card of Charles Davis dated May 16, 1977, is too late; a card bearing the name Alice Ickes dated December 7, 1976 was not properly authenticated; Marjorie Wrobel signed a card December 7, 1976 but is a supervisor; the cards of Frances and Dennis Wilkerson dated February 8, 1977 are too late; Cheryl Talkington signed a card December 7, 1976 but was not an employee of the Respondent; Sandra Lewis was no longer employed when she signed a card November 22 or 23, 1976; there is no evidence that the cards of Timothy Taylor and Debra Taylor were signed on December 19, 1976 or any other relevant date; the record shows that Robert Kaster was no longer employed on the date he signed a card, December 6, 1976; Barbara Carter who signed a card on December 18, 1976 was on neither the December 3 nor the December 20, 1976 payroll.

complexes.[34] The General Counsel has introduced only 27 valid Union-authorization cards dated on or before December 3, 1976.[35]

The only other period for which we have an accurate reliable payroll list in evidence is that ending December 20, 1976, when the unit complement totaled 125 employees.[36] The General

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[34] The name of Linda Smith, who was hired as a caretaker at Southland Apartments December 2, 1976, and discharged December 7, 1976, is included in this number.

[35] These cards were signed by the following employees on the dates stated:

Micheal Karpouskie	11/21/76
Theresa Bryan (Ryan)	11/21/76
Joe Gerwatowski	11/22/76
Mary Wendel	11/22/76
Kenneth Peer	12/03/76 (erroneously dated 12/4/76)
Ginger Peer	12/03/76 (erroneously dated 12/4/76)
Darrel Ezmerlian	11/20/76
Margaret Lewis	11/20/76
David Hughs	11/20/76
Craig Feebish	11/20/76
Debbie Feebish	11/20/76
Gordon Brown	11/20/76
Jim Schulz	11/20/76
Nellie Schulz	11/20/76
John Hodges	11/22/76
Dorothy Hodges	11/22/76
Clarence Goold	11/20/76
Lysle Davis	11/17/76
Myrl Davis	11/18/76
Harold Dodson	11/19/76
Madeline Dodson	11/19/76
Larry Davis	11/18/76
Phyllis Davis	11/18/76 (erroneously dated 11/17/76)
Robert Kimberly	11/22/76
Ricky Davis	11/18/76
Rodney Johnson	11/18/76
Mary Johnson	11/18/76

[36] Four card signers were terminated between the two pay- (Cont. on App. 47)

Counsel presented only 44 valid cards signed on or before December 20, 1976.[37]

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[36] (Cont. from App. 46) roll periods -- Theresa Bryan, Michael Karpouskie, John Hodges, and Dorothy Hodges.

[37] These cards were signed by the following employees on the dates stated:

Ricky Davis	11/13/76
Phyllis Davis	11/13/76
Larry Davis	11/18/76
Clarence Goold	11/20/76
Madeline Dodson	11/19/76
Robert Kimberly	11/22/76
Myrl Davis	11/18/76
Lysle Davis	11/17/76
Mark Rushing	12/07/76
Rodney Johnson	11/18/76
Debra Feebish	11/20/76
Craig Feebish	11/20/76
Mike Bodell	12/07/76
Mary Johnson	11/18/76
Harold Dodson	11/19/76
Margaret Lewis	11/20/76
Gordon Brown	11/20/76
David Hughs	11/20/76
Joe Gerwatowski	11/22/76
Mary Wendel	11/22/76
Kenneth Peer	12/03/76
Ginger Peer	12/03/76
Sandra Miller	12/07/76
Richard Miller	12/04/76
Mark Trustkowski	12/07/76
Dewaine Brown	12/04/76
Darrel Ezmerlian	11/20/76
Pat Carter	12/18/76
Dolores Thatch	12/07/76
Frank Thatch	12/07/76
Carter Baxpon	12/07/76
Terry Smith	12/07/76
Yolanda Reynolds	12/07/76
Robert Keating	12/07/76
James Schulz	11/20/76
Nellie Schulz	11/20/76
Emmett Ickes	12/07/76

(Cont. on App. 48)

As the Board has never to my knowledge issued a bargaining order where, as here, Union is not shown to have represented a majority of employees in the appropriate unit, I conclude that such an order is not justified in this case. In these circumstances, no determination is made as to whether the unfair labor practices committed by the Respondent would have warranted a bargaining order under **N.L.R.B. v. Gissel Packing Co., Inc.**, 395 U.S. 575, if majority status had been shown.

Upon the foregoing findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[38]

ORDER

Seligman & Associates Inc. and its wholly owned division, Scott Management Company, Southland, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with employees' Section 7 rights or discouraging membership in Local 79, Service Employees International Union, AFL-CIO, or any other labor organization, by discharging or otherwise discriminating against employees in regard to hire or tenure of employment or any other term or

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[37] (Cont. from App. 47)

Charles Reynolds	12/07/76
Vera Young	12/07/76
Elka Yanke	12/07/76
Daniel Marler	12/06/76
Elizabeth Wasilewski	12/07/76
Matthew Young	12/07/76
Dennis Wilkerson	12/04/76

[38] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto be deemed waived for all purposes.

condition of employment.

(b) Coercively interrogating or threatening employees, or prohibiting them from talking to new employees about the Union.

(c) Transferring, promoting or reclassifying employees in an attempt to gerrymander the unit in a Board election.

(d) Threatening to discharge employees for testifying at a Board hearing.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer David Younce, Susan Younce, Clarence Goold, Larry Davis, Ricky Davis, Charles Davis, Mark Rushing, Harold Dodson, and Madeline Dodson full, immediate, and unconditional reinstatement, and make them whole with interest, in the manner described in the Remedy section of this Decision.

(b) Preserve and upon request make available to the Board or its agents for examination and copying all timecards; payroll, social security, and personnel records and reports; and all other records necessary to determine the amount of backpay due under this Order.

(c) Post at the Apple Grove Apartments, Belmont Manor Apartments, Century Square Townhouses, Congress Hills Apartments, Eureka Garden Townhouses (Phases 1 & 2), Fox Lane Apartments, Grosvenor North Apartments, Grosvenor East Apartments, Oxford Place Townhouses, Park Hills Apartments, Roanoke Apartments, Mayfair Apartments, Rushmore Apartments, San Dee Apartments, Southland Apartments (Phases 1 & 2), Utica Green Apartments, Utica Plaza Apart-

ments, and Woodbrook Apartments (Phases 1 & 2) in the Detroit Michigan Metropolitan Area, copies of the attached notice.[39] Copies of the notice on forms provided by the Director of Region 7 of the Board shall be signed by an authorized representative of the Respondent, posted by it immediately upon receipt thereof, and maintained for 60 consecutive days thereafter in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that notices are not altered, defaced or covered by any other material.

(d) Notify the Director of Region 7, in writing, within 20 days from the date of this Decision, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that all allegations of the complaint not specifically found herein be dismissed.

Dated, Washington, D. C. August 15, 1978

/S/

Almira A. Stevenson
Administrative Law Judge

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[39] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

240 NLRB No. 10

JMT
D--4612
Southfield, Mich.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Seligman & Associates, Inc.,
and its wholly owned division,
Scott Management Company
and
Local 79, Service Employees
International Union, AFL-CIO
and
David Younce, an Individual

Cases 7—CA—13576,
7—CA—13752(1-4),
7—CA—13948, and
7—CA—14086

DECISION AND ORDER

On August 15, 1978, Administrative Law Judge Almira A. Stevenson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, General Counsel filed cross-exceptions and a supporting brief, and Respondent filed a brief in opposition to General Counsel's cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1]

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products,* (Cont. on App. 52)

and conclusions of the Administrative Law Judge and to adopt her recommended Order.

In the absence of a formal section entitled "Conclusions of Law" in the Administrative Law Judge's Decision, and upon the basis of her findings and conclusions and the entire record, we make the following formal:

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 79, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent interfered with, restrained, and coerced employees in the exercise of their rights under Section 7 of the Act, and thereby violated Section 8(a)(1) of the Act by:

(a) Discharging David and Susan Younce on account of their concerted activity in meeting together with other employees to

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[1] (Cont. from App. 51) *Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

The Administrative Law Judge's Decision contains several inadvertent errors which, however, do not affect the conclusions herein, as follows: (1) "7—CA—13752(1-4)" instead of "17—CA—13752(1-4)" is the correct case number in the Statement of the Case; (2) in the Statement of the Case, the date of filing and serving of the charge in Case 7—CA—13948 is reflected as "April 8, 1977" whereas the record establishes that the correct date is "April 7, 1977"; (3) the last sentence in sec. III, B,5(a) and the last sentence in sec. III, B,5(b) are both followed by a reference to fn. 28; the text of fn. 28 itself clearly refers to the subject matter discussed in the latter section; (4) the first sentence of fn. 28 refers to Phyllis Davis; the record does not reveal any corroborative testimony of Phyllis Davis on the particular point; however, the record does reveal that the testimony of Ricky Davis corroborates the testimony of Larry Davis on that point.

discuss their complaints about working condition.

(b) Threatening employees with being replaced because of their union activities.

(c) Coercively interrogating employees about their union activities.

(d) Imposing upon employees proscriptions against their talking about the Union.

(e) Threating to discharge employees for testifying at Board-conducted hearings.

(f) Threatening to use unlawful means to prevent union organization.

4. Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging Clarence Goold because of his leadership in the union movement.

5. Respondent violated Section 8(a)(4), (3), and (1), of the Act by:

(a) Discharging Mark Rushing because he had been subpenaed to testify on behalf of the Union at a Board-conducted hearing.

(b) Discharging Madeline Dodson because she had been subpenaed to testify on behalf of the Union at a Board-conducted hearing.

(c) Discharging Harold Dodson because he had testified contrary to Respondent's interests at a Board-conducted hearing.

6. Respondent violated Section 8(a)(1) of the Act by promoting Lysle Davis, Larry Davis, and Rodney Johnson as assistant managers, in an attempt to gerrymander the bargaining

unit so as to defeat the Union's organizational efforts.

7. Respondent violated Section 8(a)(3) and (1) of the Act by discharging Larry Davis, Ricky Davis, and Charles Davis because of their known or suspected support of the Union.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondent has not committed any other unfair labor practices alleged in the complaint.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Seligman & Associates, Inc., and its Wholly Owned Division, Scott Management Company, Southfield, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

Dated, Washington, D.C. January 24, 1979

Howard Jenkins, Jr., Member

Betty Southard Murphy, Member

John C. Trusedale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT interfere with our employees' rights under Section 7 of the National Labor Relations Act, as amended, or discourage membership in Local 79, Service Employees International Union AFL-CIO, or any other labor organization, by discharging or otherwise discriminating against our employees in regard to hire or tenure of employment or any other term or condition of employment.

WE WILL NOT coercively interrogate or threaten our employees, or prohibit you from talking to new employees about the Union.

WE WILL NOT transfer, promote, or reclassify our employees in an attempt to gerrymander the unit in an NLRB election.

WE WILL NOT threaten to discharge our employees for testifying at an NLRB hearing.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed in Section 7 of the Act.

WE WILL offer David Younce, Susan Younce, Clarence Goold, Larry Davis, Ricky Davis, Charles Davis, Mark Rushing, Harold Dodson, and Madeline Dodson full, immediate, and unconditional reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent jobs, without prejudice to seniority or other rights and privileges previously enjoyed; and WE WILL make them whole for any

loss of pay suffered by reason of the discrimination against them, with interest.

SELIGMAN
& ASSOCIATES, INC.,
AND ITS WHOLLY
OWNED DIVISION, SCOTT
MANAGEMENT COMPANY

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Patrick V. McNamara Federal Building, 477 Michigan Avenue -- Room 300, Detroit, Michigan 48226, Telephone 313--226--3244.

No. 79-1115

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SELIGMAN AND ASSOCIATES, INC.,
Petitioner,

v. ORDER

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Before: WEICK and MARTIN,
Circuit Judges; and NIXON, District Judge.

On petition to review and cross-petition to enforce an order of the National Labor Relations Board,

This cause came on to be heard on the record of proceedings before the National Labor Relations Board and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that enforcement of the order of the National Labor Relations Board be and it is hereby granted.

It is further ordered that Respondent recover from Petitioner the costs on appeal as itemized below.

ENTERED BY
ORDER OF THE COURT.

/S/

Clerk

No. 79-1115

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SELIGMAN AND ASSOCIATES, INC.,
Petitioner

v. ORDER

NATIONAL LABOR RELATIONS BOARD,
Respondent

Before: WEICK and MARTIN,
Circuit Judges; and NIXON, District Judge.*

Upon consideration of the petition for rehearing filed herein by petitioner, the Court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

IT IS THEREFORE ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY
ORDER OF THE COURT
JOHN P. HEHMAN, CLERK

/S/

Chief Deputy Clerk

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*Honorable John T. Nixon, United States District Judge for the Middle District of Tennessee, sitting by designation.

Office-Supreme Court, U.S.
FILED
SEP 1 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

SELIGMAN & ASSOCIATES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

JAMES CALLEAR
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that petitioner was the employer of the employees at the 21 residential complexes it managed, and that the complexes constituted an appropriate unit for purposes of bargaining.

2. Whether the Board's procedure in resolving the unit issue was proper.

3. Whether petitioner was prejudiced by the court of appeals' ruling on the Board's unit determination.

4. Whether the Board's remedial order was proper.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 639 F. 2d 307. The decision and order of the National Labor Relations Board are reported at 240 N.L.R.B. No. 10 (Pet. App. 5-56).

JURISDICTION

The judgment of the court of appeals (Pet. App. 57) was entered on January 21, 1981. The Company's petition for rehearing was denied on April 30, 1981 (Pet. App. 58). The petition for a writ of certiorari was filed on July 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.* ("the Act"), are set forth at pages 1-3 of

the petition. Other relevant portions of the Act are as follows (29 U.S.C. 152(2) and 158(a)):

Section 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly * * *.

Section 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

* * * * *

STATEMENT

1. Petitioner is a holding company with several operating divisions, one of which is Scott Management Company. Scott provides property management services to apartment and condominium projects (Pet. App. 8-9; A. 517-518, 903).[1] Scott is completely owned and controlled by petitioner and, as one of its unincorporated operating divisions, answers directly to its board of directors (Pet. App. 9; A. 694-695). Petitioner has contracts with the owners of 21 apartment projects to manage the projects on behalf of the

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[1] "A." refers to the appendix in the court of appeals.

owners (Pet. App. 9; A. 528-529, 549-550, 603). In return for a management fee, paid from the gross income of each apartment complex, petitioner provides a full range of management services and "generally supervises and does all the jobs that an owner would do" (Pet. App. 9-10; A. 559-560, 566-567, 941).

Petitioner maintains a central staff of about 12 employees, including four property managers, who are paid out of its management fee (Pet. App. 10-11; A. 662, 674, 701). Each property manager is assigned to several apartment projects (Pet. App. 11; A. 568-569).[2] At each project, there is an on-site or resident manager and, depending on the size of the project, assistant managers, caretaker couples, and maintenance personnel (Pet. App. 6-7, 12; A. 706-707, 733-735, 742-744). The property managers hire and fire the resident managers at each project (Pet. App. 11; A. 722-723). The resident managers, in turn, hire, fire and assign work to the employees at their projects (Pet. App. 12; A. 707-710, 742-743). Property managers also hire and fire project employees, and transfer resident managers and other employees from one project to another (Pet. App. 11, 12; A. 217-219, 233-234, 446-448, 726, 734, 762-763).

Petitioner determines the range of pay and benefits that employees in the various classifications receive (Pet. App. 13; A. 727-730, 734-735). The resident managers all start at similar wage levels and receive the same benefits—use of an apartment, free utilities, and health insurance (Pet. App. 9; A. 565-566, 723). Within the salary range set by petitioner,

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[2]The property managers visit each complex for which they are responsible once a week to make sure that preventive maintenance programs are carried out, apartments are prepared properly for new tenants, the projects are kept clean, and office files are maintained in proper order (Pet. App. 11; A. 568-569, 702-703).

each resident manager determines the salaries of the various employees at his project, with the additional constraint that salaries must remain within a budget established for the project by the property manager (Pet. App. 11-12; A. 707, 730-731, 742-743). Both the resident managers and project employees are paid from the gross revenues of the apartment projects where they work (Pet. App. 12; A. 600-601, 937). Petitioner, however, maintains a common payroll and accounting system for all employees of the apartment projects (Pet. App. 10; A. 570-571, 582, 637-651). Employees at the various projects are paid with checks drawn on the account of "Seligman & Associates, Inc." and receive a single W-2 form for all work performed at any of the apartment projects (Pet. App. 10; A. 570, 572, 918, 920).

In September 1976, as a result of growing dissatisfaction with working conditions, employees at Eureka Townhouses met to discuss their complaints and select spokesmen to present their grievances to petitioner (Pet. App. 18; A. 74-79, 143-146). On October 7, 1976, petitioner discharged caretaker couple Susan and David Younce because of meetings they attended with other employees and complaints they registered regarding working conditions (Pet. App. 18-20; A. 43-45).[3] As a result of continued employee dissatisfaction, employee Sam Goold contacted Local 79, Service Employees International Union, AFL-CIO ("the

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[3]Following the filing of unfair labor practice charges, petitioner made reinstatement offers to most of the unlawfully discharged employees (Pet. App. 43; A. 116-117, 614). The Younces rejected the reinstatement offer and, later, decided to withdraw their unfair labor practice charge (A. 610-613). On the last day of the six-month limitations period for filing charges, however, the Younces filed a new charge alleging that manager Lincoln LaFrance had violated the Act in discharging them (Pet. App. 15-16). After filing the charge with the Board, Susan Younce personally served a copy of the charge on manager LaFrance at the company's office at the Eureka Townhouse apartments where the Younces worked and were discharged (Pet. App. 16; A. 47-51).

Union"), and a campaign to organize employees at the apartment complexes managed by petitioner began (Pet. App. 28-29; A. 285, 287, 619). On December 8, 1976, the Union filed a petition for election in a unit of all maintenance men, custodians, caretakers, and groundsmen employed at the apartment projects managed by petitioner (Pet. App. 6).

Beginning in December 1976, petitioner repeatedly engaged in conduct designed to discourage employee support for the Union. Petitioner threatened to eliminate the position of caretaker and subcontract maintenance work to outside contractors (Pet. App. 21, 23, 24-25; A. 261, 411-412, 616); interrogated employees about the Union (Pet. App. 22, 23, 24-25; A. 178, 202, 465); threatened to use unlawful means to prevent the Union from coming in (Pet. App. 24-25; A. 210-211); and threatened to discharge employees for and prohibited employees from talking about the Union (Pet. App. 22-23; A. 254, 369-469). In January 1977, following the beginning of the Board hearing on the Union's representation petition, petitioner discharged organizer Sam Goold, purportedly for unsatisfactory work (Pet. App. 29; A. 301-302). This unfair labor practice proceeding was thereafter instituted, and the separate representation procedures were suspended (Pet. App. 2).

2. In a decision affirmed by the Board, the administrative law judge found that petitioner exercised full control over persons employed at the apartment complexes and was, therefore, an "employer" within the meaning of Section 2(2) of the Act (Pet. App. 13-14, 52). The administrative law judge also found that petitioner's threats, interrogations, discharge of the Younces, and prohibition of discussions regarding the Union violated Section 8(a)(1) of the Act (Pet. App. 52-53). Further, the judge found that petitioner's discharge of Sam Goold was motivated by his

Union activities, thereby violating Section 8(a)(3) and (1) of the Act (Pet. App. 53).[4]

To remedy its unfair labor practices, petitioner was ordered to reinstate the unlawfully discharged employees with backpay (Pet. App. 42-43). The Board further ordered that petitioner post notices at all 21 of the apartment complexes. As the administrative law judge explained (Pet. App. 42):

> Inasmuch as the [petitioner's] unfair labor practices directly affected many employees at seven of its apartment complexes, in view of the nature and extent of the unfair labor practices found, and as they were committed by the [petitioner's] managers, project managers, and president, I find no merit in the [petitioner's] contention that notices should be required only in those complexes where unfair labor practices were committed, and find that the policies of the Act will be effectuated by requiring that notices be posted in all 21 complexes employing unit employees.

The General Counsel also requested that petitioner be ordered to bargain with the Union as part of the remedy for the unfair labor practices committed (Pet. App. 43).[5] In

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[4]Petitioner did not except before the Board to the administrative law judge's further findings that it violated Section 8(a)(1) of the Act by promoting employees to the position of assistant manager in an attempt to "gerrymander" the bargaining unit in which the Union election was to be held (Pet. App. 39-40); violated Section 8(a)(3) and (1) of the Act by discharging Union supporters Larry, Ricky, and Charles Davis (Pet. App. 40-42); and violated Section 8(a)(4), (3), and (1) of the Act by discharging Mark Rushing and Harold and Madeline Dodson because they testified or were subpoenaed to testify at the Board hearing on the Union's election petition (Pet. App. 31-36). No issue concerning these findings is involved here.

[5]See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969).

order to determine whether the Union had obtained authorization cards from a majority of employees, the administrative law judge held that an appropriate unit consisted of petitioner's employees employed at the 21 apartment complexes, including the assistant managers at the complexes who were determined not to be statutory supervisors (Pet. App. 43-44).[6] Because the Union failed to obtain cards from a majority of employees in the unit, the administrative law judge denied the request for a bargaining order (Pet. App. 47-48).

3. The court of appeals upheld the Board's decision and enforced its order. The court concluded that substantial evidence supported the Board's finding that petitioner was the employer of the employees at the apartment complexes. The court stated that "[t]here is ample evidence of Scott's full and centralized control over the employees and that the employees have the common interests necessary to comprise an appropriate unit" (Pet. App. 3). The court rejected petitioner's assertion that it should not rule on the appropriateness of the unit because that issue was pending appeal in the representation proceeding. The court noted that

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[6]During the unfair labor practice hearing, the General Counsel was allowed to place into evidence the 900-page transcript and exhibits from the hearing on the Union's election petition in order to establish that petitioner was the employer of the employees at the projects and that a unit of employees at the 21 apartment complexes was appropriate for the sought-after remedial bargaining order (A. 494-498, 508). Petitioner appealed to the Board the administrative law judge's ruling that the General Counsel could establish the appropriateness of the unit by introducing the transcript and exhibits from the representation proceeding while petitioner was precluded from offering additional evidence on matters included in the representation proceeding (A. 946-948). The Board reversed the administrative law judge "to the extent that any party may call witnesses to testify with respect to the appropriateness of the unit in the representation case" (A. 949). The unfair labor practice hearing was subsequently reopened, and petitioner elicited 150 pages of testimony from its president, Irving Seligman (A. 950, 524-526).

"[t]he issue was relevant to the Board's request for a bargaining order and was fully litigated below" (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 14-15) the Board's findings, upheld by the court of appeals, that it was the employer of the employees at the 21 apartment complexes and that the complexes constitute an appropriate unit for bargaining are not supported by substantial evidence.[7] These purely evidentiary issues do not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). In any event, as shown above (pages 3-4, *supra*), the record amply supports the Board's findings that petitioner controls the employment relationship of the complexes' employees (Pet. App. 13-14) and that the employees of the 21 apartment complexes share a community of interest sufficient to justify grouping them in a single bargaining unit (Pet. App. 43-44).

2. Petitioner's argument (Pet. i, 10-12) that the Board improperly based the unit determination on the "sole evidence" of the representation proceeding record rests on a significant factual omission. The Board did not rely solely on the representation proceeding record; rather it directed that the unfair labor practice hearing be reopened and

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[7]Petitioner also asserts (Pet. i, 16-17) that three unspecified unfair labor practice findings also are not supported by substantial evidence. Since the petitioner does not in any way substantiate that claim we do not deal with it here. Petitioner also asserts (Pet. 12-14) that the Younces' charge was procedurally defective. The court of appeals (Pet. App. 4) upheld the Board's finding that service was properly made on the property manager at the complex where the Younces worked and found no evidentiary support for petitioner's assertion of a waiver. The court further found "no reason to invoke the equitable doctrine of estoppel" (*ibid.*). These findings are based on the particular facts of this case and raise no issue warranting review by this Court. In any event service here was plainly sufficient under the Act. See *NLRB* v. *Clark*, 468 F. 2d 459, 463 (5th Cir. 1972).

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petitioner be allowed to call any witness to testify as to the unit issues. Petitioner availed itself of that opportunity and elicited 150 pages of testimony on the issue. In these circumstances, admission of the representation proceeding record in no way deprived petitioner of the opportunity to present its case.[8] See *Amalgamated Clothing Workers of America, AFL-CIO* v. *NLRB*, 365 F. 2d 898, 905 (D.C. Cir. 1966).

3. There is no merit to petitioner's additional contention (Pet. i, 8-9) that it was prejudiced by the court of appeals' determination of the unit issue because that issue should properly be resolved in the representation proceeding that was pending on appeal to the Board at the time of the unfair labor practice proceeding. As the court of appeals noted (Pet. App. 3), the administrative law judge had to make a unit determination in considering the merits of the General Counsel's request for a bargaining order. Although petitioner now asserts the court of appeals erred in determining the unit issue, it was petitioner who requested the court of appeals to review the merits of the unit issue should the court find that the administrative law judge properly reached the issue (see petitioner's brief in the court of appeals at 1-2, 15-16, 29-37; a copy of this brief has been lodged with the Clerk of this Court). Having decided, adversely to petitioner, that the administrative law judge properly reached the unit issue, the court then reviewed the substantiality of the evidence supporting the unit

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[8]Petitioner also contends that the administrative law judge erred in admitting the Regional Director's unit determination into the record. However, the Regional Director's decision was not determinative of any issue in the unfair labor practice proceeding, and the administrative law judge made an independent determination of the unit and employer issues based on the testimony and exhibits before her (Pet. App. 13-14, 43-44).

determination—an issue placed before the court and extensively briefed by petitioner.[9] In these circumstances petitioner cannot be heard to complain that it was prejudiced by the court's resolution of an issue that it requested the court to review.

4. Finally, there is no merit to petitioner's objections (Pet. i, ii, 16-17) to the Board's remedy. Petitioner asserts (Pet. 16) that there was no factual basis for the Board's order requiring it to post notices at all of the 21 complexes it managed. Petitioner discharged nine employees and made numerous coercive statements and threats over an extended time period (see pages 4-5 and note 4, *supra*). Further, the company's unfair labor practices were centrally directed and occurred at seven of the 21 apartment complexes. Given the pervasiveness of petitioner's unfair labor practices, the Board's notice posting order, aimed at countering the coercive effects of the petitioner's actions, was well within the Board's authority and is not "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943). And see *Decaturville Sportswear Co.* v. *NLRB*, 406 F. 2d 886, 888-889 (6th Cir. 1969).

Petitioner also complains (Pet. 17) that it was improperly ordered to reinstate the discharged employees, asserting that it had already reinstated some of them. The administrative law judge left resolution of the question "[w]hether or not the [petitioner] has made adequate offers of reinstatement to some of the discriminatees" to the compliance stage

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[9]Contrary to petitioner's assertion (Pet. 9), there was no "stipulation" or agreement between the Board and petitioner not to contest the unit determination. The Board took the position in the court of appeals that there was no occasion for the court to review the unit determination since petitioner had prevailed before the Board on the bargaining order issue.

of this proceeding, explaining that the matter "was not fully litigated" (Pet. App. 43). The Board's reinstatement order included backpay. If, as petitioner claims, it made valid reinstatement offers to some of the unlawfully discharged employees, this fact will mitigate any backpay claims formulated in compliance proceedings. In any event, the law is long settled that the Board is entitled to enforcement of its order even if petitioner has complied with it. *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

JAMES CALLEAR
Attorney
National Labor Relations Board

AUGUST 1981

DOJ-1981-08